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**CONSTITUTIONAL LANGUAGE RIGHTS OF OFFICIAL-LANGUAGE MINORITIES  
IN CANADA**

A study of the legislation of the provinces and territories  
respecting education rights of official-language minorities  
and compliance with section 23 of the  
Canadian Charter of Rights and Freedoms

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## BIOGRAPHICAL NOTE

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The opinions expressed herein are those of the author and do not necessarily represent those of the Government of Canada.

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## CONTENTS

FOREWORD vii

INTRODUCTION 1

### PART I. PROVINCIAL STUDIES

I. NEWFOUNDLAND 19

II. PRINCE EDWARD ISLAND 27

1. Fact situation 29
2. Historical development 29
3. Right of access to a French-language school 32
4. Questions relating to instructions in French 35

III. NOVA SCOTIA 39

1. Fact situation 41
2. Historical development 41
3. Right of access to French-language schools:  
obligatory designation 48
4. Questions relating to instruction in French 49

IV. NEW BRUNSWICK 53

1. Fact situation 55
2. Historical development 55
3. The New Brunswick school system 59
4. Effects of the reform 63

V. QUEBEC 72

1. Fact situation 73
  2. Denominational rights 75
  3. Present legal situation 94
  4. Administrative and related matters 108
  5. Proposals for reform 115
- Conclusion 121

VI. ONTARIO 123

1. Fact situation 125
  2. Denominational schools 126
  3. Access to French-language schools 139
  4. Administrative structures and related matters 154
  5. Reforms 163
- Conclusion 184



VII.	MANITOBA	187
1.	Fact situation	189
2.	Denominational schools	190
3.	Access to French-language schools	198
4.	Administrative structures and related matters	205
	Conclusion	209
VIII.	SASKATCHEWAN	211
1.	Fact situation	213
2.	Denominational schools	214
3.	Access to French-language schools	220
4.	Administrative structures and related matters	244
5.	Proposals for reform	249
	Conclusion	254
IX.	ALBERTA	257
1.	Fact situation	259
2.	Denominational schools	260
3.	Right of access to French-language schools	268
4.	Administrative and related matters	273
	Conclusion	277
X.	BRITISH COLUMBIA	279
1.	Fact situation	281
2.	Denominational schools	282
3.	Access to French-language schools	283
4.	Administrative and related matters	288
	Conclusion	290
XI.	NORTHWEST TERRITORIES AND YUKON	293
	Northwest Territories	295
1.	Fact situation	295
2.	Administrative matters	300
	Conclusion	304
	Yukon	304
	Conclusion	308

## PART II. SYNTHESIS

Introduction	311
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I.	Interpretation of section 23	313
1.	The liberal interpretation	315
2.	Section 23 remedies the errors of the past	319
3.	Section 23 adds rights to existing education systems	320
4.	Section 23 is a standard for equality	322
	Conclusion	324



II.	Analysis of Education Legislation	327
1.	Discretionary powers	329
2.	Sufficient numbers	333
3.	The definition of French-language instruction - immersion and bilingual schools	336
4.	French-language schools	339
5.	Management of schools	342
	Conclusion	343
III.	The Nature of Section 23	345
1.	Civil and political right, or social and cultural right	348
2.	Collective or individual right	351
3.	The role of the courts	355
IV.	Denominational Rights and Language Rights	361
1.	Method of establishing schools, numbers tests	363
2.	Access to the schools	364
3.	Substance of the right to manage	364
4.	Separate school funding	368
	Conclusion	370
V.	Impact of Section 1 on Section 23	371
VI.	Legislative Reforms	378
1.	Objectives of reform	379
2.	Substance of reform measures	390
3.	The reform process	399

## APPENDICES

I.	General Description of the System by Province	405
II.	Draft Education Act: Provisions Respecting Rights of Linguistic Minorities	433
III.	Draft Regulations	439
IV.	Table of Legislation	443
V.	Table of Books and Articles	447
VI.	Table of Cases	451
VII.	Relevant Constitution Documents	457





## FOREWORD

This study was carried out over the period of a year as part of the Interchange Canada program. The author takes full responsibility for all opinions expressed, which do not necessarily represent those of the Government of Canada or of any province.

The method used consisted largely of researching the law, the cases and the available documents. Informal discussions were held with members of the legal community and of official language minority groups, and with government representatives. A questionnaire was sent to the departments of education of the provinces and territories, the responses to which appear in the appendix.

We deliberately limited the scope of this study, as otherwise it could have expanded beyond the point of usefulness. We therefore did not attempt to collect every guideline issued by every school board in the country, nor every statement by every pressure group, and concentrated rather on the most significant documents.

An earlier version of the sections on New Brunswick, Prince Edward Island and Nova Scotia was previously published in the University of New Brunswick Law Review, 1984, vol. 33, p. 97, at pages 123 and 149.

Our research is complete up to April 30, 1985. At that point, we were awaiting the results of the following matters:

- in Newfoundland, a proposed legal challenge for the purpose of obtaining a French-language school in Grande Terre;
- in Nova Scotia, various proposed legal challenges concerning designation of Acadian schools, immersion and access to schools on military bases;
- in New Brunswick, the appeal judgment in SANB v. Minority SB No. 50;
- in Prince Edward Island, a proposed reference to the full bench of the Supreme Court on the validity of the School Act;
- in Quebec, a judgment on the validity of Bill 3, which is designed to reorganize the school system along language lines, as it affects the protection of denominational rights; the publication of an article by Professor Pierre Carignan on the concept of collective rights in education law;

- in Ontario, extension of full funding to Roman Catholic secondary schools, a proposed legal challenge to full funding, and a Bill on minority-language school management;
- in Manitoba, a proposed legal challenge to the validity of the Schools Act and the regulations;
- in Alberta, the judgment at trial in the Bugnet case;
- in British Columbia, settlement of the problems surrounding school transportation for French-speaking pupils;
- in the Yukon and Northwest Territories, development of French-language school programs.

The reader should therefore keep in mind that these various factors will have an effect on the relevance of some aspects of this study. A follow-up should be undertaken five years from now, to review the situations listed above. However, there was a need for an initial attempt to sort through the law as it stood at the end of April 1985, and we have done this with the information at our disposal up to that date.

Finally, we have studied each province separately. The reader need therefore consult only the introduction, the section on the province of interest to him or her, and the summary. The studies of each of the provinces follow the same general plan: fact situation, denominational rights where applicable, legislative provision for access to minority-language education, administrative and related matters (in which we have noted various provisions of the legislation dealing with territorial changes, the powers of the school boards and of the Minister, management-related questions, and school transportation). We have paid particular attention to four major decisions, in the sections devoted to the provinces where they arose: the SANB case in New Brunswick, the cases on the denominational school boards' powers of taxation and on the validity of Bill 101 in Quebec, and the reference to the Court of Appeal in Ontario. The Supreme Court decision in Caldwell is cited in the summary, in section IV (on denominational rights).

We hope that this research will contribute to the advancement of minority education rights, by providing a more integrated view of the problems that will arise under section 23 of the Charter and of possible solutions to those problems. We are grateful to all those whose contributions made this study possible.



## INTRODUCTION

Education has always been a subject of serious discussion in Canada. The debate surrounding the enactment of section 93 of the Constitution Act, 1867, and the litigation that was generated in an effort to interpret the section, indicate that Canadians have always been concerned about their school systems. Recent developments have borne out this observation: in 1984, English school closings in Montreal were met by stormy meetings of parents, and in Ontario the highest authorities of the churches became involved in the debate about funding for separate high schools.

The constitutional framework of the educational system was altered when the Canadian Charter of Rights and Freedoms came into effect on April 17, 1982. Section 23 of the Charter entrenches what official language minority groups have consistently demanded in Canada: the right to homogeneous schools which they will manage themselves.<sup>1</sup> However, the political context of the entire patriation process managed to obscure the innovative aspects of section 23 somewhat. Legal commentary on the enactment of section 23 was focused on the Quebec situation,<sup>2</sup> since one of the reasons why Quebec refused to sign the agreement of November 5, 1981, was the inclusion in the agreement of a provision that restricted the powers of the National Assembly in relation to language and education.<sup>3</sup> When section 23 came into effect, a wave of hope spread among French-speaking minorities outside Quebec. They waited for their provincial governments to react, but when progress was slow some groups went to the courts, and more have indicated their intention to do so in the near future.

This study presents a first attempt to examine the record of each province in education, and to analyze the effects of the rights conferred by section 23 of the Charter on official language minority groups in Canada. It is intended primarily for use by the legal community, and so it examines legislation, regulations and guidelines for each provincial system as they relate to the substance of section 23 of the Charter. The second part is an effort to bring together the constitutional rights that relate to education into a coherent whole, both to facilitate future interpretation in the courts and, most importantly, to begin the process of giving concrete expression to these rights, in legislation that will comply with the

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1. On this point, see the brief of the Fédération des francophones hors Québec to the Special Joint Committee of the Senate and of the House of Commons, November 26, 1980; the recommendations and testimony of francophone groups before the committee: proceedings of the committee, first session, 32nd Parliament: ACFO 8:46, SFM 10:26, ACFC 12:7, FFHQ 13:26.
  2. See the articles cited in the bibliography.
  3. See the speech of Premier Lévesque to the National Assembly.

requirements of the Constitution. We hope that this process will allow us to separate the question from its political context, which is not directly within our mandate, so that we may rather consider the legal consequences of section 23 of the Charter. Our role is not to judge the merits of section 23; it has become part of the Constitution of Canada, the supreme law of the land, and it should be given the attention it deserves.

By way of introduction, we shall consider the origin of section 23, related provisions of the Constitution, and the questions raised by the substance of section 23.

1. Origin of section 23

In 1867, the Fathers of Confederation did not see fit to provide explicitly for protection of language rights in the schools. There were sociological reasons for taking this approach: at that time, education was still largely under the control of the Catholic and Protestant clergy. Catholics were French-speaking, Protestants were English-speaking. It was therefore believed that if denominational rights were protected, the language of the schools would also be preserved. Nevertheless, the courts held that language and religion were not legally identical, and that only religion enjoyed the protection granted by section 93 of the Constitution Act, 1867.<sup>4</sup> Thus, in the twentieth century we find the francophone community in Canada outside Quebec in decline, with continuing efforts to maintain French-language schools outside Quebec in spite of the law, the courts and any number of other impediments. These efforts are reviewed in the study of each province. For English-speaking Quebecers it would appear the protection of the Protestant school system will be adequate protection of English-language schools.

In 1968, these efforts were given new life with the publication of Book II of the Report of the Royal Commission on Bilingualism and Biculturalism.<sup>5</sup> The commission recognized the fundamental importance of education for minority groups, and proposed a series of measures to entrench the right of minority language communities in the country to obtain instruction in their own language and in their

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4. Supra, as amended by SN, 1975, c. 44, s. 2.

5. Supra, footnote 1, p. 343.



own schools.<sup>6</sup> As we shall see, several provinces reacted by liberalizing their school systems to some extent.

Constitutional provision for the language of instruction was first discussed in 1969. The federal government's white paper, The Constitution and the People of Canada, which was tabled at a constitutional conference, proposed to include such rights in a Charter:

The right of the individual to have English or French as his main language of instruction in publicly supported schools in areas where the language of instruction of his choice is the language of instruction of choice of a sufficient number of persons to justify the provision of the necessary facilities.<sup>7</sup>

As may be seen, the intention was essentially to entrench freedom of choice in language of instruction, and not to grant special rights to minority language groups.

The Victoria Charter of 1971 contained no provision for education rights. In 1972, the Joint Committee of the Senate and House of Commons on the Constitution recommended that the right to instruction in the language of the minority be entrenched. The committee noted that freedom of choice in language of instruction was a fundamental right of the individual that no government should be permitted to restrict.<sup>8</sup>

The principle that was eventually entrenched in section 23 of the Charter was first stated in 1977. At the St. Andrews Conference in 1977, the first ministers agreed to make all necessary efforts to provide instruction in the language of the minority wherever numbers warranted.<sup>9</sup> In Montreal in 1978 they stated the following principle:

"Each child of the French-speaking or English-speaking minority is entitled to an education in his or her language in the primary or the secondary schools in each province wherever numbers warrant."<sup>10</sup>

It will be noted that the emphasis has since shifted. We have moved from freedom of choice in language of instruction to the protection of minority rights, which is quite a different matter.

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6. Id., recommendations.

7. The Constitution and the People of Canada, white paper published on the occasion of the second meeting of the Constitutional Conference on February 10, 11 and 12, 1969.

8. See the report of the Special Joint Committee of the Senate and of the House of Commons on the Constitution, Ottawa, Information Canada, 1972.

9. St. Andrews Accord.

10. Montreal Accord, first principle.

Freedom of choice implies uncontrolled access by the majority to the schools of the minority. In practice, as we shall see, such freedom of choice results in bilingual schools, which lead to the assimilation of minority language pupils.

On the other hand, protection of the minority implies restriction on access by the members of the majority to the schools of the minority, because of the danger of assimilation. These measures are in the nature of "affirmative action" - reverse discrimination. On the other hand, such measures cannot prevent access by members of the minority to the schools of the majority if they so desire: unless the framers of the Constitution impose complete segregation along language lines - which would be clearly discriminatory - the minority cannot be prevented from assimilating if that is what it wants to do.

The St. Andrews Accord calls for further comment. The "numbers warrant" test is to be determined on a provincial basis, and not by region or school district; if such numbers (which cannot be established) are met, **each** child of the minority group enjoys the right. The first ministers did not appear to make geographic concentration a criterion.

In 1978, the Prime Minister of Canada tabled Bill C-60. This Bill proposed, inter alia, that there be a Charter adopted, section 21 of which would entrench education rights.<sup>11</sup> Section 21 confined the number required to an intra-provincial geographic region, provided for access to minority-language schools in the province (and not the region) for parents whose first language was the minority language and who resided in the region in question. The English version used the expression "facilities that are provided in that area out of public funds," thus excluding the right to manage. Section 21 provided for the constitutional right to be exercised by the parent sending a notice of intent, and protected the right of provincial legislatures to provide for reasonable methods of determining numbers. Rights and privileges relating to denominational schools were also protected.

These provisions were ignored by the framers of the Constitution, who did not want to see them enshrined in the fundamental law of the land. In one sense, section 21 of Bill C-60 was more restrictive than the present section 23 of the Charter, in that it made the right conditional on a request, implicitly denied the right to manage and placed limits on the method of calculating numbers.

The Task Force on Canadian Unity recommended in 1979 that the Montreal principle be included in the Constitution, stating that this

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11. cf., Re Essex County RC Sep SB and Porter (1984), 5 DLR (4th), p. 665.



right should be granted to children of each minority language group who moved from one province to another.<sup>12</sup>

In 1980, the intensity of constitutional discussions increased. Following the Quebec referendum in May 1980, a constitutional conference was held but no results were obtained. As well, on October 2, 1980, the Prime Minister of Canada introduced a resolution in the House of Commons to patriate the Constitution. This resolution contained a new amending formula and a Charter of Rights, in which the first version of section 23 appeared. The prime minister stated:

Every Canadian will be guaranteed the right to move freely to any part of Canada to seek a job, to buy a home, to raise a family in his or her traditions. And, inseparable from that, the right of parents, be they English-speaking or French-speaking, to have their children educated in their own official language will be assured.<sup>13</sup> (Our emphasis.)

This passage indicates the primary intention underlying section 23. First, it was to be an essential addition to the mobility rights: thus Canadians would not feel constrained from settling in a province other than their own for fear that they would not be able to educate their children in their own language. The emphasis was on mother tongue, a criterion adopted in Quebec in Bill 22 but abandoned in Bill 101 in favor of the educational history of the parent or the child. Secondly, there was to be no numerical restriction on the exercise of this right. Thirdly, the right was tied to the parents' language, and therefore was not directly associated with the concept of minority rights. Fourthly, the expression "in that language" implied that the primary objective of the guarantee was to preserve the linguistic homogeneity of the schools: it does not appear to have been a guarantee of a right to French immersion for anglophones; or a right of access for a child of the majority to the schools of the minority, or vice versa; or a right to bilingual schools; or - and this point should be noted, in view of the federal proposals that preceded the 1980 resolution - and absolute guarantee of freedom of choice in language of instruction.

The original version of section 23 was a better statement than section 21 of Bill 60. It was composed of two distinct parts: protection of minority language groups and protection of mobility rights.

Subsection 23(1) conferred a right on parents whose mother tongue was that of the minority in a province, i.e. anglophones in Quebec and francophones outside Quebec. The right granted was the right to have their children instructed in the language of the minority. It could be exercised in any region of the province where the number of children warranted the provision of educational facilities.

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12. Task Force on Canadian Unity, A Future Together, Ottawa, Queen's Printer, 1979.

13. Text of the prime minister's speech, Ottawa, Prime Minister's Office, October 2, 1980, p. 6.

Subsection 23(2) could to some extent be seen as entrenchment of freedom of choice. It appears to us to be more clearly drafted than the version ultimately adopted, but also as far from the primary objective as the present version.

This subsection covered citizens who move from one province of residence to another. It permitted them to have their children educated in the language in which one of their children had begun his or her education in the former province of residence. The numbers test was identical to the test in subsection (1). This right was no longer tied to the parent's mother tongue or to the language of the minority. It therefore did not cover the case of an anglophone whose child had begun school in English in Toronto and who moved to Montreal and became part of the minority, or the case of a francophone whose child had begun his or her schooling in French in Quebec and who moved to Halifax: these cases were covered by subsection (1). Subsection (2), however, would have permitted our Toronto anglophone, one of whose children had begun his or her schooling in French immersion, to send them to a French-language school in Montreal, an objective that was also shared by Bill 101; it would have permitted our Quebec francophone whose child attended an English-language school to send all his or her children to English-language schools in Halifax, which is not contrary to the law of Nova Scotia. Thus there was a right of access by the minority language group in a province to the schools of the majority, which is to some extent contrary to the first objective of section 23.

Subsection (2) would have had another, more serious consequence: the majority could have access to the schools of the minority. A Quebec anglophone whose child attended French school would have a right to send all his or her children to French school in Halifax. A Toronto francophone whose child attended English-language school would be able to send all his or her children to English-language school in Montreal. The objective of subsection (1), to have a homogeneous French-language school for francophones in Halifax or a homogeneous English language school for anglophones in Montreal, was thus jeopardized.

As we shall see, the present version removed this requirement that the right be exercised only in the case of a change in the province of residence, but retained the spirit of that provision, with the result that a number of concerns remain.

Along with the broader discussions that took place throughout the country between 1980 and 1982, the education question received wide attention. In January 1981, the Minister of Justice tabled in the House a series of amendments to the initial resolution. Section 23 was transformed.<sup>14</sup> In subsection (1), a clause was added to the mother tongue clause, dealing with parent's primary school

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14. Text of amendments to the constitutional resolution and explanatory notes, Ottawa, January 1981.



instruction in Canada - the famous "Canada clause," which would prevail over the "Quebec clause" in Bill 101, which limited access to English-language instruction to parents who had been educated in English in Quebec. Subsection 23(2) was also amended: the requirement of a change in province of residence was removed. The numbers test was removed from each of the two subsections and included in a separate subsection, and the wording of the provision was changed: rather than "to warrant the provision out of public funds of minority language educational facilities" the number had to be sufficient to "warrant the provision to them out of public funds of minority language instruction in that area." The reference to "educational facilities" had been removed. The framers of the Constitution corrected this lacuna with the addition of a second paragraph to subsection (3), referring to "minority language educational facilities"; in French, the word "installations" was changed to "établissements," and the results of this change were significant. While French- or English-language "installations" was a neutral term implying a strictly linguistic characteristic of physical premises, the change to "établissements" was eventually to make it possible for the Court of Appeal of Ontario to read into the provision a management structure, while the expression used in French, "de la minorité" ("minority language educational facilities," in English), permitted the court to consider the cultural importance and community role of linguistic homogeneity in the schools. Paragraph 23(3)(b) transformed the approach of the entire section: from a guarantee of instruction in French or English, we returned to the initial conception of the goal of section 23, the protection of minority language groups. This transformation, this return to a concept of protection for minorities rather than freedom of choice in language of instruction, changed the approach that we must take in interpreting section 23. If section 23 represents a constitutional guarantee intended to encourage the development of minority language groups, it should permit them, by exercising their right to manage, to control access to their schools and to control the nature of their schools. Does section 23 prohibit measures to establish bilingual schools or French immersion classes for francophones? It would be difficult to say that it does, but it is nevertheless clear that such measures do not respect minority rights, as paragraph 23(3)(b) understands them. Thus a province may maintain these two kinds of systems, for those who want them, but it cannot argue that by doing so it is complying with section 23 and so offer only these programs for its minority language group. Linguistic minorities now have a right to more than bilingual or immersion schools: they have a right to homogeneous schools that they can manage themselves.

Section 23 as it is now framed no longer imposes complete segregation of the linguistic communities. It does not prevent members of the minority language group from having access to the majority schools. However, it does prevent the majority language group from having unlimited, uncontrolled access to the minority schools: since the minority manages these schools, it must be able to determine who may attend them. The only categories over which the minority has no control in determining access are those described in subsections 23(1) and (2).

The origins of section 23 give us an indication of the two distinct kinds of problems it poses: access to the right (in subsections 23(1) and (2)) and the nature of the right (subsection 23(3)). The big question in Quebec apart from actual entrenchment of these rights appears to be access to English-language schools. For francophones outside Quebec, the question is one of how to define and manage a French-language school.

In all these cases, we shall emphasize the distinction to be made between the nature of the right and procedures for exercising it. In our opinion, the nature of the right includes the criteria for access to minority language schools as well as the definition and management of the school. The procedures for exercising the right include the mechanisms by which concrete expression will be given to these rights. We believe that it is in this respect that provincial variations, adapted to the school systems of the provinces, may validly exist. The substance of the rights guaranteed in the Constitution of Canada should not, however, be determined by the province in which one resides.

## 2. Other related constitutional provisions

Section 23 of the Charter is set in the context of a number of other sections of the Constitution, which we shall discuss briefly.

Section 93 of the Constitution Act, 1867, is of most immediate concern. This section grants exclusive jurisdiction over education to the provinces, and protects the existing rights of religious groups. This protection is strengthened by section 29 of the Charter, which establishes that denominational rights are to prevail over any other provision of the Charter, including language rights. As a result, the most difficult problem, in our opinion, lies in the need to strike a balance between the right to manage denominational schools, and the right to manage minority language schools. We shall see that the courts have considered these two rights not to be incompatible, and that francophone Catholics outside Quebec and anglophone Protestants in Quebec enjoy dual protection. However, serious difficulties arise when we attempt to create intermediate management structures in minority language schools without splitting the provincial school systems into four distinct bodies: French- and English-language denominational school systems, and French- and English-language public school systems. We believe that section 23 of the Charter will permit some reorganization of resources so as to preserve denominational rights within a linguistically homogeneous system. If our analysis is not correct, we would have to make provision for language-based sectors within the existing denominational systems a plan that would not be to the advantage of the minority language groups in the country, which would be obliged to work in tandem with the majority language group on questions of major importance (budgets, among other things), and would lead to balkanization of the school systems and a management system that is even more complicated and burdensome than it is already. We shall develop these ideas further in our synthesis, and we hope that they will be favorably received.

Section 15 of the Charter entrenches equality rights and non-discrimination. Language is not included as a prohibited ground of discrimination, but the list of grounds in section 15 is not exhaustive, and it could be argued that discrimination on the basis of language would not be permitted. The new concept of "equal benefit of the law" makes it possible to compare the treatment of official language minority groups in education, and to challenge any provisions that discriminate against them. While subsection 15(2) is not formulated as a mandatory provision, it does authorize the provinces to promote the education rights of their minority language groups. Together with section 23, it encourages the provinces to strengthen the protection of minority language education rights.

Subsection 16(3) of the Charter has the same effect: it is a constitutional encouragement to "advance the equality of status or use of English and French." When we apply this provision to education, it should assist us in interpreting section 23 in such a way as to advance equality of status of the two languages. Legislative provisions that provide for one language to be the principal language of instruction, with the other language as the exception, are contrary to this objective.

Finally, section 27 of the Charter is an interpretation provision, which provides a context for reading and analyzing section 23, and has been used for this purpose. It permits us to regard section 23 as going beyond the simple question of language, and rather as a true affirmative action plan for official language minorities themselves.

### 3. Application of section 23

The first step in this study will be an introductory, empirical examination of the contents of section 23 of the Charter and the questions raised by that section. Generalized solutions to these problems will be discussed in a summary at the end of the research.

#### I. Criteria that are common to section 23 as a whole

##### 1.1 Citizens of Canada

This criterion will be determined at the time the right guaranteed in 23 is claimed, so that everyone who is not a citizen of Canada will be subject to provincial provisions respecting education.

We may anticipate a number of problems connected with citizenship at the point the right guaranteed in 23 is claimed:

- Under 23(1)(b) (language of primary school instruction in Canada), it does not appear to be necessary for the applicant to have been a citizen of Canada before receiving such instruction; he or she need only be a citizen at the time the claim is made for instruction for his or her



children. However, 23(1)(b) could be interpreted otherwise, so as to limit the right to people who were citizens of Canada when they received their primary school instruction.

- Under 23(2) (language in which another child has received instruction) it does not appear to be necessary that the child be a citizen of Canada, or for the applicant to have been a citizen of Canada at the time his or her child received the instruction; he or she need only be a citizen of Canada at the time the claim is made for instruction for all his or her children. The use of the expression "Citizens of Canada of whom any child has received or is receiving... instruction...", however, would make it possible to argue the contrary position.

## 1.2 Minority language

The concept of minority language as it is used in 23 is applied in the provincial context. The only groups that receive this protection are francophones outside Quebec and anglophones in Quebec. The status of regional minorities becomes a particular problem, since they have no rights guaranteed by the Charter. What would be the constitutional validity of a legislative provision granting rights to a regional minority which is part of the provincial majority (such as anglophones in northeast New Brunswick)? There is of course nothing to prohibit the adoption of provisions of this nature, provided that they would not have the effect of making the members of the regional majority into a minority in terms of education. The same comment would apply to members of the minority who are able to control an educational system because of the fact that they are concentrated in a particular area.

## 1.3 Residence

Residence must be determined at the time the right guaranteed in 23 is claimed, and so is a matter to be decided under the applicable provincial law. It is clear from 23(1) when the question of residence is to be determined.

## 1.4 Child

The expression "child" as used in the Charter must be taken to include children born both inside and outside marriage.

The Charter gives citizens of Canada the right to have **their** children receive instruction; this provision could exclude grand-parents, tutors and guardians. Broad interpretation of the Charter would result in a different application: the right should be granted to all people who have parental authority under the provincial legislation in effect when the claim is made.

The Charter places no limit on the age of children; however, since the right affects primary and secondary education, the children

affected will probably be children of school age under provincial legislation in effect at the time the claim is made. It would therefore appear that adult education and education for people who are above the age of compulsory school attendance would not be covered by 23.

### 1.5 Primary and secondary

In some provinces, kindergarten is included in the primary system, while in other provinces it is not provided.

The law that would apply to the definition of the expressions "primary" and "secondary" would undoubtedly be the law in the province in which the right guaranteed in 23 is claimed, rather than the law of the province in which the necessary conditions for claiming the right were fulfilled. These definitions may vary from province to province. The courts might be tempted to develop a definition for these terms that would be specific to the Constitution, but to do so would be to place undue limits on the jurisdiction of the provinces over education.

### 1.6 Instruction in the minority language

Does the expression "instruction" in the minority language as used in 23 mean instruction entirely in that language, or a substantial portion of instruction in that language? This question is significant in view of the practice in some provinces of limiting the time of daily instruction in French.

- If we adopt the interpretation that is most favorable to full rights for the linguistic minority, that is, **all** instruction, we still limit the effects of 23(1)(b) and 23(2), by excluding people who have studied, or are studying, in bilingual programs.
- If we adopt the broadest interpretation, more people will be able to claim these rights, but we retain bilingual schools, which are often instruments for the assimilation of minorities.
- Is it possible that we can have two different interpretations for the expression "instruction" to be used in two different contexts? For the purposes of 23(1)(b) and (2), "instruction" would be interpreted to mean "a substantial portion for their instruction," while for the purposes of the rights in question it would mean the right to receive instruction entirely in the minority language.

Does the expression "instruction" mean all instruction, or part of the instruction received? When is the instruction received in the minority language sufficient to satisfy the requirements of 23(1)(b), and (2)? If a person is entitled to section 23 rights under 23(1)(b), must his or her entire primary program have been in the minority language?

- The right to instruction itself should be taken to include the right to have full primary and secondary instruction, including the more technical secondary courses.
- If the length of primary instruction required in order to come within 23(2) were "all" instruction, the goal of 23(2) would be completely obviated, so that this cannot be the proper interpretation of the requirement in 23(2).

Does instruction mean more than just provision of courses?

- Instruction may include hiring qualified teachers. Can a teacher be dismissed if he or she is not qualified to teach in the minority language?
- Instruction would also include student textbooks and material used by teachers.

Does instruction include separate structures in the department of education? Programs and material should meet provincial standards of quality; a stable provincial structure facilitates compliance with such standards.

Does instruction in French include total French immersion? The wording of 23 does not exclude this possibility.

However, the goal and spirit of section 23 would lead to the conclusion that French instruction does not include immersion, since immersion is designed for learning a second language.

## II. Persons entitled to claim rights

Three situations are covered by section 23: mother tongue, language of primary instruction (Canada clause) and language of instruction of one of the children.

### 2.1 Parent's mother tongue: 23(1)(a)

The problem raised by this criterion (which is more academic than practical) is how it is determined: how can we know what language was learned first and is still understood?

- By a voluntary statement by the parent.
- By language tests set by the department of education, by the school board, or by the school itself. The concept is difficult to apply in practice, given the need to ensure that tests are appropriate, results are valid and there are procedures available for disputing the results.
- Before the courts: by affidavit or viva voce evidence.

### 2.2 The language of the parent's primary instruction (Canada clause): 23(1)(b)



Subject to the comments made supra relating to the definitions of "instruction" and "primary" and problems of citizenship, there is no particular difficulty with this criterion.

2.3 The language of instruction of one of the children: 23(2)  
(mobility clause)

Must the instruction received by the other child have been received in a province other than the province where the right is claimed? No: amendments made to 23(2) explicitly removed the requirement that the family has moved.

Must the instruction received by the child have been received in the same province as the parents' residence? For example, an Acadian from Saint John, New Brunswick, sends his children to school in French in Quebec; does he acquire the right to send all his children to French-language school in N.B.?

The wording of 23(2) itself does not limit the right, so that the situation suggested here would give the parent a guaranteed right to French language education for the other children.

Does 23(2) provide a constitutional guarantee of free choice of the language of instruction in Canada, or does it apply strictly to the linguistic minority in a province?

- In that 23(2) does not refer to the minority language, whereas 23(1) and (3) do make such references, it could be argued that 23(2) permits anglophones who have a child who received his or her instruction in French to send all their other children to a French-language school, thereby guaranteeing that the majority will have access to the minority's schools.
- Does this interpretation permit anglophones to go from total French immersion to instruction in French as the first language? There is nothing in the wording of 23(2) to prohibit this interpretation.
- In that 23(2) appears in the context of providing a guarantee to the minority, we might try to limit its meaning to include only members of the minority. In our opinion, this latter approach is preferable. It would preserve the spirit of section 23, and ensure that 23 is interpreted in accordance with the intention of the drafters of the Constitution: to preserve and give concrete expression to the rights of the linguistic minority in a province, and not to confer rights on the majority.

III. Conditions for exercising the right

3.1 Number

3.1.1 Number in 23(3)(a)

The condition imposed in 23(3)(a) is on the number of children, and not the number of parents making a claim. The language of the children is not the relevant condition, but rather the criteria set out in 23(1) and (2) must be considered. The number required is an objective condition, which would justify the expenditure of public funds. The number is to be determined on the basis of the province as a whole, and not on the basis of a single district. The criteria to justify provisions for minority language education are not yet known, but the following might be considered: the minimum number of classes or schools for the majority, provincial and federal financing, the potential for easily transporting students, and the school districts.

### 3.1.2. Number in 23(3)(b)

The expression "where the number so warrants" does not tie the number requirement to a financial justification or a provincial determination. Nevertheless, it would be difficult to imagine criteria which would differ from those set out in 23(3)(a).

## 3.2 Public funds

Public funds would certainly include provincial funds provided for education.

In provinces where school taxes are levied locally, it will be necessary to ensure that the level of taxation for francophones is not higher than for anglophones, particularly in view of section 15 and 36 of the Charter.

Are federal funds covered by 23(3)? Normally, the expenditure should be considered as a function of the constitutional jurisdiction; the federal government uses its power to expend funds in order to assist with the additional costs involved in providing instruction in the official language of the minority. Since subsection 23(3) does not place any limits on the concept of public funds, it could leave the door open to an interpretation that would include federal funds, particularly if the provision of instruction in the minority language can be connected to a matter of federal jurisdiction (having national implications, or within the residual power).

## 3.3 Educational facilities

The issue here is not only of homogeneous schools, but also of the right to take part in managing the schools.

A homogeneous school (one **belonging to** the linguistic minority) would not be designed to permit attendance by anglophone students under 23(1)(b) and (2). There will have to be procedures for integrating this population and controlling access by such students.

Possible conditions for entrance could include the student's ability in the language, a requirement that one of the two parents have French as the mother tongue, or a requirement that the parents communicate regularly with their children in French.

#### IV. Remedies

It would appear that the easiest remedy, and the one likely to be relied on most frequently, is an application to have a statute, regulation or even an internal policy declared invalid. Such an action would permit other people besides the parents to intervene, and judges are more comfortable with this form. However, it would not solve the problems in situations where the minority does not have the necessary infrastructures, and has run up against persistent refusals by the educational authorities. We would have to expect that in a later phase there would be increasingly aggressive challenges unless the education legislation is corrected.





**PART I**  
**PROVINCIAL STUDIES**





**I. French-Language Educational Rights  
in Newfoundland**



Franco-Newfoundlanders live primarily in Labrador City and the Port-au-Port Peninsula. They make up 0.5% of the population of the province, but at the last census the French-language community included almost 500 children of school age, of whom 128 were enrolled in the only program provided entirely in French, in the elementary and secondary schools of the Labrador City Catholic School Board. That board uses teaching material from the Province of Quebec. There are other children in a few immersion classes in six areas, including Port-au-Port, St. John's, Avalon and Terra Nova, although it is difficult to estimate the number of children involved. There are nearly 500 elementary schools and 257 secondary schools in the province. Eighteen of the 35 school boards employ a French-language co-ordinator, two of whom are more directly involved in teaching French. Immersion programs have enjoyed wide success, and take in nearly 40% of the school population.

The Schools Act, RSN, 1970, c. 346, and the regulations make no reference to the language of instruction in Newfoundland. In 1982, the minister agreed to add to the statement of the objectives of public education in Newfoundland a statement of principle indicating that the government supports and recognizes the right of francophones in Newfoundland and Labrador to receive instruction in their mother tongue. While such a statement is important from a political point of view, it is of no legal value: no action could be brought in the courts on the basis of such a statement of policy. It appears that francophones have had a number of problems in having the spirit of the statement transformed into concrete institutions. Even in Labrador City, financial difficulties and falling enrolment have endangered the survival of the only French-language program in Newfoundland. There is no homogeneous French school on the island, despite repeated requests from parent groups in Port-au-Port and elsewhere.

The legislature's silence together with this inaction on the part of the authorities could eventually lead to legal action being taken. The Newfoundland school system is fairly decentralized and is fully denominational, so that there might have to be legislative intervention to wipe the slate clean first, although the low numbers of francophones would in that case operate against them.

The denominational school system in Newfoundland is a result of section 17 of the Terms of Union of Newfoundland with Canada, the Newfoundland Act, 1949:

In lieu of section 93 of the BNAA, 1867, the following term shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the legislature will not have authority to make laws denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of the Union, and out of



the public funds of the Province of Newfoundland, provided for education,

- (a) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the legislature for all schools then being conducted under authority of the Legislature; and
- (b) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis.

There has been only one judicial interpretation of this provision, which is also the only significant interpretation of the Newfoundland Schools Act. The case of RCSB Exploits - White Bay and NTA,<sup>1</sup> affirmed by the Court of Appeal,<sup>2</sup> raised the question of the constitutionality of the Newfoundland Teacher (Collective Bargaining) Act.<sup>3</sup> The Catholic School Board decided to close a school because of falling enrolment, and in accordance with the Act prepared a seniority list for the purposes of effecting lay-offs; however, it placed in priority on this list the names of two religious brothers who were not entitled to that level of seniority. The union filed a grievance, and the school board objected to the jurisdiction of the arbitration board on two grounds: first, that the two teachers had a contract with the archbishop and were not subject to the Act; and secondly, that an arbitration decision would violate a right or privilege with respect to denominational schools, in particular the right of people of one religion to receive education from priests of their own denomination. A majority of the members of the arbitration board held that the teachers were employees of the school board, and were subject to the collective bargaining legislation; this decision was affirmed by the Supreme Court and the Court of Appeal.

On the point of interest to us, the majority of the arbitration board held that the Collective Bargaining Act did not affect any right or privilege of Catholics; the right that was protected is the right to receive a religious education in Catholic schools, but not necessarily to be taught by priests.

The school board appealed the decision, relying on section 19 of the 1973 Act,<sup>4</sup> which set out the guarantee contained in Term 17 of the Terms of Union, as follows:

1. (1983), 140 DLR (3d), p. 338.
2. (1983), 147 DLR (3d), p. 186.
3. SNfld., 1973, c. 114.
4. Supra, as amended by SN, 1975, c. 44, s. 2.

No provision in any collective agreement or award or decision of a board of arbitrators appointed under this Act, nor anything done hereunder, shall abrogate, impair or otherwise howsoever infringe upon any right or privilege to which Term 17 of the Terms of Union of Newfoundland with Canada set forth in the Schedule to the British North America Act, 1949, applies.

The court rejected the school board's argument; it stated: "Term 17 does not, expressly or by implication, state an intention that all law relating to education would become unalterable at the date of Union."<sup>5</sup> In support of this finding, the court cited Hirsh,<sup>6</sup> Ex. p. Renaud,<sup>7</sup> Barrett<sup>8</sup> and Mackell,<sup>9</sup> and observed that Newfoundland legislation prior to 1949 had not conferred the right now claimed by the school board. The court described the system as follows (p. 346): The Education Act of 1927<sup>10</sup> provided for denominational schools for each denomination which chose to operate schools. The province was divided into districts, each under the management of a board, the members of which were of the same denomination as the district and were appointed by the Governor-in-Council. The powers of the board included organizing elementary education and appointing and dismissing teachers. Teachers' working conditions were regulated by the Act. Those who were members of religious orders were hired on the same basis as lay teachers, and the school board could not alter those provided by the Act. The rules governing this system today are different, but the school boards have no more power than in 1927. Consequently, the legislature has done nothing to affect a right or privilege with respect to denominational schools.

There is also an additional decision in support of the argument that the provincial legislature retains significant autonomy in organizing the provincial school system.<sup>11</sup>

We shall now consider the administrative structures. Internally, there is a bilingualism program co-ordinator, attached to the programs branch, who is responsible for both the immersion and

5. Supra, footnote 1, p. 343.

6. [1928] AC, p. 200.

7. (1973), 14 NBR, p. 293.

8. [1892] AC, p. 445.

9. [1917] AC, p. 62.

10. SN, 1927, c. 14.

11. cf., Re Essex County RC Sep SB and Porter (1984), 5 DLR (4th), p. 665.

the French-language programs. (In practice, the second program is less important, given that the only French-language program in the province, in Labrador City, follows the Quebec program exactly.) In addition, a teaching adviser supervises the operation of the French as a second language program. Finally, as we have noted, there are French-language co-ordinators in about 18 school boards, two of whom are directly involved in teaching French.

As we noted above, subsection 5(1) of the Schools Act establishes denominational school districts, described in the Schedule to the Act. Section 4 extends the legal existence of the districts that were established in 1960,<sup>12</sup> while subsection 5(3) permits the Lieutenant-Governor-in-Council to establish additional districts or to create new ones, for any religious denomination or group not specified in the Schedule, if the House of Assembly approves the group for such purposes in accordance with subsection 5(9).

A minimum of seven members is appointed to a school board by the Minister<sup>13</sup> on the recommendation of the proper education committee; at least one of the members shall be an officer of a religious denomination recommended by the church authorities,<sup>14</sup> and at least one-third of the members must have been elected.<sup>15</sup> Unless otherwise provided, no member is eligible for reappointment for more than two terms.<sup>16</sup> The powers of the school boards that concern us are set out as follows:

#### Section 12 - Duties

- (a) to organize elementary and secondary education in the district, and provide and maintain schools;
- (c) to appoint and dismiss teachers;
- (g) to cause to be followed the courses prescribed by the Minister, any additional course or textbook requiring prior approval;
- (m) where arrangements are made by it for the transportation of pupils, to ensure that the vehicles are in good condition.

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12. SN, 1960, c. 50.

13. S. 7(1) of the Schools Act, amended SN, 1983, c. 76, s. 130.

14. Pa. 7(3)(a) and (e).

15. S. 7(3)(b)(i), (4) and (5).

16. S. 7(9).



### Section 13 - Powers

- (b) to permit the use of schools;
- (j) to employ non-teaching personnel;
- (k) to allocate surplus funds to schools in other districts, or to schools within its district but not directly under its control;
- (n) to impose school taxes, with the approval of the Minister, in respect of different classes of schools or of pupils;
- (r) to encourage enrichment in the school curriculum;
- (t) to enter into agreements with another school board for the education of pupils within its district and for transporting them.

Every district shall have a Superintendent, whose duties are, inter alia:

### Section 19

- (d) recruit staff and assign them with the approval of the school board;
- (e) determine which school a pupil shall attend, subject to the approval of the school board;
- (f) recommend promotions, transfers and terminations;
- (h) supervise schools;
- (i) articulate programs;
- (j) improve programs;
- (k) provide advice on renovations and new buildings;
- (o) make known to the public the policies of the school board.

A school board may also provide for the establishment of school committees with the duties set out in section 22, including:

- (a) managing buildings;
- (b) recommending new facilities;
- (g) liaison between the school board and the community;
- (e),(f) any other duty assigned by the school board.

A special part of the Act is devoted to pre-university level colleges, which are also denominational and are subject to rules that are similar to those affecting schools.<sup>17</sup> Part III provides for the creation of public schools under the jurisdiction of the minister.<sup>18</sup> Subsection 48(1) provides for the following two possibilities:

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17. Ss. 41 et seq.

18. S. 50(2).

- (a) the school board wishes to abandon a public school that it administers;
- (b) there is no public school, no school board wishes to create a public school and two-thirds of the residents request one.

Subsection 59(1) makes such schools subject to the programs prescribed by the minister. Finally, subsection 68(1) permits the creation of recognized private schools if the facilities and programs are adequate and the teachers are qualified.<sup>19</sup> The financial system is centralized.<sup>20</sup>

Overall the system appears to be decentralized as to both language and programs of education, and close attention will be required to ensure that any measures taken to implement section 23 of the Charter are uniform and do not affect the considerable existing powers of the religious denominations (Integrated, i.e. Anglican, United Church, Salvation Army, Catholic, Pentecostal, Seventh-day Adventist, Presbyterian). The interaction between section 23 and section 93 of the BNA Act, 1967 (as amended for Newfoundland) will be the crucial issue.

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19. S. 79.

20. Part VII of the Schools Act.

## **II. French-Language Educational Rights in Prince Edward Island**





## 1. Fact situation

The 1981 census indicates that francophones make up 5% of the population of the Island, but this number should be used with caution, considering the very small population of the Island itself and the high rate of assimilation among francophones. There is only one French-language elementary school on the Island, and one combined French-language school, accounting for only 2% of the Island's student population. There are two school boards providing instruction in French, but only one board that operates in French: in the western part of the Island, where the Acadian population is largely concentrated. Recent efforts to open a francophone centre in Charlottetown and a French-language class in Summerside failed. Some parents now intend to submit the Island's educational record to the courts; a reference to the Court of Appeal is being prepared and could be heard before the 1985 school year begins. In any event, the situation is not rosy for the French-speaking minority on the Island, and the question of numbers is of particular interest here.

## 2. Historical development of educational rights

### (a) Pre-Confederation

Prince Edward Island was ceded to the English in 1763 by the Treaty of Paris, and in 1769 formed a local government separate from that of Nova Scotia.

The first Schools Act on the Island dates from 1825.<sup>1</sup> It provided for financial assistance by the government for all schools with an attendance of 10 male students; this number should be noted. There was no religious or language requirement in the Act. In 1861, all legislation respecting schools was consolidated into a single Act, which contained the first reference to Acadians on the Island: if Acadians wished to receive public financing, they were required to have a minimum of 18 pupils, and otherwise were required to fund their own education.<sup>2</sup> In addition, Acadian teachers were subject to three requirements: first, like all teachers in the province, they had to pass an examination by the school board where they worked; if they did not pass this examination they were required to present a certificate issued by the priest of the parish certifying that they were capable of teaching in French; they had then to confirm that they were teaching a minimum of 30 children for three months or more. Since it was not specified that the 30 children must be in one class, we must conclude that the minimum 18 children referred to above continued to be applied, and that the teacher had therefore to be responsible for at least two classes. Finally, a teacher had to obtain a certificate from the inspector of schools, certifying that he had taught a course in English during the three preceding months. We can therefore conclude that instruction in French was legally

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1. Schools Act, (1825) 5 Geo. IV, c. 5.

2. An Act to consolidate and amend the several laws relating to education, (1861) 24 Vict., c. 36.

recognized, but that a minimum of English instruction required to be taught.

According to Alexandre Savoie, in 1854 there were 13 French schools out of a total of 169, and in 1858 there were 20 out of 218.<sup>3</sup> In 1868, a bonus of five pounds was given to a French teacher who was teaching a class of at least 10 pupils.<sup>4</sup>

Thus there have been provisions on the Island for recognition of French-language schools, although there has been no right to receive instruction in French.

Thus there have been provisions on the Island for recognition of French-language schools, although there has been no right to receive instruction in French.

(b) Post-Confederation

The post-Confederation period was not a fruitful one for the Acadians. Those on the Island did not escape the wave of Protestantism and anglicization that seemed to have broken across the entire country in the 1870s.

In 1877 the PEI Public Schools Act was passed.<sup>5</sup> This Act totally reformed the school system, and established mandatory neutral education. As elsewhere, it enraged Acadians and the government was obliged to adopt a more flexible position. The new board of education finally authorized the use of French books, which had first been banned because they were considered too religious; in 1892, an Acadian inspector was appointed to supervise French-language

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3. Savoie, Alexandre, L'enseignement en Acadie, 1604-1970, p. 432.

4. (1868) 31 Vict., c. 6, s. 72:

LXXII. Any teacher, male or female, who shall in addition to the qualifications, required by this Act, be qualified to teach the French language, and who shall have taught in his school, (French), to a class of not less than ten pupils, shall, on producing from the Board of Education, a certificate of his competence to teach the French language, be entitled to receive five pounds over and above the salary to which such teacher may be entitled under this Act provided that Trustees of such school district do raise the like sum of five pounds for such teacher by voluntary subscription from the inhabitants, and provided further, that the number of teachers receiving the aforesaid increase of salary, shall not amount to more than twenty.

5. (1877) 40 Vict., c. 1, s. 62; schools were to be non-sectarian, but Bible readings were permitted, as before. The Act also provided for local taxation to finance a number of educational expenditures. The previous provision was revoked and there was nothing in the Act dealing with language of instruction. The board of education's regulatory powers, on the other hand, were broad enough to include the question.



instruction in the Acadian schools; in 1893, francophone teachers founded the "Association des instituteurs et institutrices acadiens de l'Île du Prince-Edouard" (association of Acadian teachers of Prince Edward Island). And that was where progress ended. The Department of Education was created in 1945,<sup>6</sup> but it provided no place for Acadians. Finally, it was not until 1971 that there was a major reform of educational structures on the Island.<sup>7</sup> The small, fragmented school boards were united in five large administrative units, and French-language instruction was authorized in the fifth unit, Evangéline.

Finally, in 1980 the legislature confirmed the educational rights of francophones, but in restrictive terms and with little respect for constitutional requirements.

On April 8, 1980, the Lieutenant Governor proclaimed the Act to amend the School Act,<sup>8</sup> which provided, among other things, for educational rights for francophones on Prince Edward Island. The new Part VI of the School Act consists of only one section, which reads as follows:

- 50 (1) In this section
- (a) "English language education" means a school program using English as the language of instruction;
  - (b) "French language education" means a school program using French as the language of instruction;
  - (c) "mother tongue" means the language first spoken and still understood by a child at the relevant time.
- (2) Each regional school board shall provide either English language education or French language education, depending on the mother tongue of the majority of students within its area.
- (3) Where a regional school board providing English language education receives a request from a group of parents, representing not less than the prescribed number of children whose mother tongue is French to also provide a French language education, the board shall provide French language education in accordance with the regulations.
- (4) Where a regional school board providing a French language education receives a request from a group of parents, representing not less than the prescribed number of children whose mother tongue is English to also provide English language education, the board shall provide the

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6. Department of Education Act, (1945) 9 Geo. VI, c. 11.

7. School Act, (1971) 20 Eliz. II, c. 55; RSPEI 1974, c. S-2.

8. An Act to amend the School Act, (1980) 29 Eliz. II, c. 48, s. 9; School Act, RSPEI 1974, c. S-2.

English language education in accordance with the regulations.

- (5) The Lieutenant Governor in Council may make regulations respecting the circumstances and conditions under which a regional school board shall provide French language education and English language education.

### 3. Right of access to a French-language school

The provisions of this Act call for some preliminary comments relating to our examination of section 23 of the Charter. It will first be noted that paragraph 50(1)(c) refers to the child's mother tongue, which is not a relevant criterion under the provisions of the Charter. Secondly, paragraphs 50(1)(a) and (b) cast doubt on our conclusion that the expression "instruction in French" in the Charter does not include immersion, since the Act defines "French language education" as a school program using French as the language of instruction; this definition could include immersion programs, since they are school programs in which French is used as the language of instruction. Unless we interpret "school program" to mean a regular program ... Thirdly, subsection 50(2) imposes a duty on the regional school board to provide education in the mother tongue of the majority of students within its area. While this criterion could stand with respect to the language of instruction in the majority of schools, thereby confirming a geographic approach to educational rights, it could not apply to the rights of the minority in the geographic area in question. The legislature has recognized this, and has provided in subsections (3) and (4) for the provision of education in the other language.

When the number required by the regulation exists, the board has a duty, mitigated by a discretionary power which we shall consider later, to comply with a request from a group of francophone parents to provide French-language classes. Failure to act could therefore be challenged by mandamus. This requirement for a request by the parents does not amount to compliance with the wording of section 23 of the Charter, which confers a positive right; even in the absence of a request, or in the event of a request by a smaller number of parents than the number required by the Act, the Charter could be used to demand French-language instruction, particularly since the number prescribed by the regulation is arbitrary, while the Charter requires that the number meet certain criteria in order to justify the expenditure of funds. Finally, the Act refers to the number of children whose mother tongue is French; this factor is not in compliance with the Charter, since subsection 23(3) of the Charter clearly indicates that the factor to be considered is the number of children whose parents are entitled to have their children educated in French. Such conflict between the Charter and the Act render subsections 50(3) and (4) of the Act inoperative.

In accordance with the Act, a regulation was adopted specifying the terms of the guarantees conferred by subsection 50(3) with respect to the rights of the francophone majority (sic) in anglophone school districts. These provisions do not apply to unit 5, which is

francophone and is obliged to provide education in French pursuant to subsection 50(1) of the Act.

Subsection 5.31 of the Regulations provides that the required number of pupils is 25. This number appears to be quite high, in view of the numbers used in other provinces.<sup>9</sup> If this requirement is met, the school board must provide education in French on the conditions set out in the Regulations.<sup>10</sup>

Even in this case, the school board retains some discretionary power, since it is required to decide whether the required number can reasonably be assembled; however, there is no criterion set out to guide the board in exercising its discretion. If it concludes that the pupils cannot be assembled, it must nevertheless seek to meet the request by offering to transport children to an institution that does provide such instruction (usually the Evangéline unit) or to register

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9. Cf., summary.

10. Subsection 5.32(1) and (3):

(1) Where, on or before February 1 in any school year, a request is received under subsection 50(3) of the Act in respect of a number of children, whose mother tongue is French, that is not less than the prescribed number, the regional school board, if it considers that the prescribed number of children can reasonably be assembled for the purpose, shall provide French language education for those children in the next school year and shall, in writing, notify the persons making the request to that effect before May 1 in the school year in which the request was made.

(3) Where pursuant to subsection (1), a regional school board considers that the prescribed number of children cannot reasonably be assembled for the purpose of providing French language education, the board shall endeavour:

(a) to arrange for those children to be transported to and be educated in a regional administrative unit that provides French language education; or  
(b) to accommodate the children in respect of whom the request was received in a French Immersion Program in the regional administrative unit.



them in the district immersion program.<sup>11</sup> Similarly, where there are fewer than 25 children, the school board may still, in its discretion, offer education in French, and if it does not it must offer the alternatives referred to supra.

Providing for discretionary power, even when the minimum prescribed number is met, amounts to a way for the legislature to discharge its constitutional obligations without conferring any rights. In this situation, we would note the hesitation of the courts to reverse an administrative decision made in the exercise of a discretionary power. We would submit that despite the existence of this discretionary power, the school board remains subject to the requirements of section 23 of the Charter. In addition, in enacting subsection 50(3) of the School Act, the legislature of P.E.I. has imposed a positive duty on the school board to provide education in French, in accordance with the regulations, if a request is made by the prescribed number of parents; by transforming this obligation into a discretionary power, the government has acted unlawfully, and subsections 5.32(2) and (3) of the regulations thereby become ultra vires: a regulatory power cannot be transformed into a discretionary power.<sup>12</sup>

Of the two options offered to a school board for complying with a request when it considers that the prescribed number of children cannot be assembled, or when the prescribed number is not met, the option of transporting the children to an institution that provides French language education appears to be the only one that complies with the Charter. While the duty to transport pupils can be a reasonable choice, it must not be used as an automatic substitute for establishing a French-language class or school. The distance that francophone children must travel should not exceed the distance travelled by anglophone children to go to school, and there must be consideration of the age of the children. It must be recalled that under the Charter territorial borders of school districts are not entirely rigid; this administrative expedient for organizing education in the province is not of an absolute nature, and language

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11. Subsection 5.32(4):

(4) Where a request is received under subsection 50(3) of the Act in respect of a number of children, whose mother tongue is French, that is less than the prescribed number, the regional school board may provide French language education for those children, but if it does not do so, it shall endeavour:

- (a) to arrange for those children to be transported to and be educated in a regional administrative unit that provides French language education; or
- (b) to accommodate those children in a French Immersion Program in the regional administrative unit.

12. Brandt Dairy v. Milk Commission of Ontario, 1973, SCR 131; Pépin, G. and Ouellette, Y., Principes de contentieux administratif, Montréal, Éditions Yvon Blais Inc., 1980, pp. 158 et seq.

rights are protected "throughout the province." Students in grade 10 can reasonably be expected to tolerate longer travelling time than can small children in grade 2.

Finally, for grades 10 to 12, no minimum number is prescribed; section 5.33 provides that the decision is within the discretion of the school board.<sup>13</sup> This provision contravenes the Charter, which grants Canadians the right to instruction in their language at both the secondary and primary levels.

#### 4. Questions relating to instruction in French

Programs and textbooks are prescribed and approved by the Minister,<sup>14</sup> but there is no identified structure within the Department of Education in P.E.I. for administering the French-language program. There is only one teaching adviser to supervise the development of this program for all grades and in all subjects. This adviser does not have a position of authority, and recommendations made by the adviser may be modified by the higher authorities in the department.<sup>15</sup> Francophones on the Island thus have only minimum and inadequate control over the content of the educational program. We noted supra that section 23 of the Charter, if liberally interpreted, could provide access to better quality government services to guarantee the standards for instruction in French.

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#### 13. Section 5.33

(1) In respect of Grades 10 and above, where, on or before February 1 in any school year, a regional school board receives a request of a number of children whose mother tongue is French to provide courses using French as the language of instruction, the regional school board shall, if it considers a sufficient number of children can be assembled for that purpose, provide such courses in the next school year.

(2) Where a request is received under subsection (1), and the regional school board considers that a sufficient number of children cannot be assembled for the purpose of providing courses using French as the language of instruction, it shall endeavour to arrange for the children in respect of whom the request was made to be transported to and enrolled in similar courses provided in another regional administrative unit.

(3) The regional school board shall in writing notify the persons making a request of the outcome thereof and where applicable, of the arrangements made under subsection (2), before May 1 in the school year in which the request was made.

#### 14. School Act, supra, footnote 8, pars. (a) and (b).

#### 15. Information received from the Société Saint-Thomas d'Aquin, a francophone pressure group on the Island.

The same is true for financing, which is provided entirely by the minister<sup>16</sup> following submission of a budget by the school board. The minister's power is entirely discretionary. In view of the requirements of subsection 50(2) of the Act, respecting provisions of French language education in the four administrative regions of the Island where they are in the minority, the regional school board must provide the necessary funding to meet its undertakings in the budget that it submitted in accordance with subparagraph 21(1)(b)(ii) of the Act. Since francophones cannot elect representatives to these school boards, because of the electoral division of the districts,<sup>17</sup> they must succeed at two discretionary levels if they are to obtain the appropriate funding for French education. The electoral division of school districts places francophones in a minority. If section 23 of the Charter were interpreted as including the right to administer the schools, this division could be challenged before the courts.<sup>18</sup> The Charter therefore provides an opportunity for all francophones in P.E.I. (including those in unit 5 who remain part of the francophone minority in the province, even if they are a majority in the district) to ask the courts for adequate funding to provide quality education in their own language.

The P.E.I. School Act nowhere confers any right to establish homogeneous schools in the four English-speaking school districts. Paragraph 50(1)(b) defines French education as a school program using French as the language of instruction. While section 5.34 of the regulations does permit a school board, at its discretion, to designate schools or classes where French education is to be provided, this provision in no way obliges a school board to designate homogeneous schools.

A school board has the discretion to determine the location of schools in its district, with the approval of the minister;<sup>19</sup> the minister may authorize the construction, if the Lieutenant-Governor-in-Council approves.<sup>20</sup> The school board determines admission

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16. School Act, supra, footnote 8, s. 8.

17. Each school board shall divide the unit into zones: School Act, supra, footnote 8, s. 14. The school board is made up of 15 members, 10 of whom are elected and five appointed by the Lieutenant-Governor-in-Council: School Act, Id., s. 11.

18. Magnet, J, Minority-language education rights, 1982, 4 supra, ct. L.R. 195.

19. School Act, supra, footnote 7, s. 22(2).

20. Id., par. 6(a)(ii).



criteria<sup>21</sup> and the placement of pupils in schools, in accordance with the regulations and the needs of the children and facilities available.<sup>22</sup> (The Act uses the word "facilities", which is the expression used in paragraph 23(3)(b) of the Charter.) On this point the regulations do not offer a great deal of assistance. Section 5.28 indicates that any student who resides or intends to reside in the province may receive school privileges free of charge, except in four narrow cases.<sup>23</sup> "School privileges" include instruction, transportation, books, and all other necessary services.<sup>24</sup> Can this expression be considered as similar to "educational facilities," the expression used in paragraph 23(3)(b) of the Charter?

As a result, whether or not new homogeneous French-language schools will be established on the Island depends, according to the Act, on the discretionary power of the school authorities. The location of such a school would be decided by the school board, which could select premises at a distance from francophone centres for opening new schools, and then transport children rather than open a class, claiming not to want to duplicate services.

The Acadians in Prince Edward Island have any real rights? The constitutional guarantees offered by the Charter have been transformed into discretionary powers. However, section 23 of the Charter is the authority that prevails on this point, and French-speaking Islanders intend to make use of these guarantees. Governments have shown themselves to have little interest in rapid application of the available mechanisms in the Act. The absence of any governmental structure to carry out this function has contributed to the perpetuation of the attitude of the authorities, and the efforts of the Société Saint-Thomas d'Aquin have until now been unsuccessful, so that the Société has now turned its efforts to moving the battle into the courts. Given an assimilation rate approaching 40%, the decreasing numbers of Acadians on the Island are losing interest and motivation to continue their struggle, but they have no other choice: the struggle is for the very survival of the Acadian fact in Prince Edward Island.

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21. Id., s. 32(1).

22. Id., s. 32(2).

23. EC 674/76, ss. 5.28(c), 5.29.

24. EC 889/80, s. 5.30.





### **III. French-Language Educational Rights in Nova Scotia**



## 1. Fact situation

Acadians in Nova Scotia have had both gains and setbacks in the realm of education. The French-speaking population, which is concentrated in Clare-Argyle, Chéticamp, Île Madame and to some extent Halifax, accounts for 4.3% of the population of the province; but because of assimilation and the lack of resources, the French-speaking student population is only 2.9% of the total. Sixteen elementary schools and 10 secondary schools have been identified as primarily francophone, and together with the seven homogeneous schools they account for 5.6% of the total. Instruction in French is offered by 22.7% of the province's school boards, but only one board operates in French. In some places, requests for schools or school boards have been refused. The reform of the Education Act in 1980 did improve the situation somewhat, particularly by recognizing a role for Acadian schools. However, as we shall see here, there are several ways in which this legislation could comply more fully with section 23 of the Charter and better accommodate the aspirations of the French-speaking minority in Nova Scotia.

## 2. Historical development

Nova Scotia was the first Atlantic colony to establish its own legislative assembly. However, the history of how educational rights developed in the province does not show significant benefits for the minority.

### (a) Pre-Confederation

Mr. Savoie writes:

Après la déportation des Acadiens en 1755, la Nouvelle-Ecosse, telle que nous la connaissons aujourd'hui, ne comptait que quelques centaines d'Acadiens, cachés dans les bois: les autres étaient prisonniers à Halifax ou travaillaient pour des Anglais à des prix dérisoires.

Dans de telles conditions, il n'est pas question d'école où les enfants se rassemblent pour étudier les rudiments de la grammaire française et des autres sciences.<sup>1\*</sup>

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### 1. A. Savoie, Enseignement en Acadie, 1604-1970.

#### \* Translation:

After the Acadians were deported in 1755, there were only a few Acadians remaining in Nova Scotia as we know it today, hidden in the woods: the others were held prisoner in Halifax or were working for the English for absurdly low wages.

In circumstances like these, there was no possibility at all for children to attend school together to study the basics of French grammar and other fields of knowledge.



He goes on to note that the influence of the priests led to the gradual development of an Acadian school system in Baie Sainte-Marie and Chéticamp. School legislation progressed fairly slowly. In 1732, Lieutenant-Governor Armstrong ordered that lands be given over for educational purposes. (This measure did not yet apply to Acadians.) In 1766, the first school Act prohibited very vigorously the establishment of "papist" schools, and thereby prevented French-language schools as well;<sup>2</sup> this restriction was removed in

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2. (1766), 6 Geo. III, c. 7: An Act Concerning Schools and School Masters.

Section 2 read as follows:

II. Provided, that no person shall presume to enter upon the said office of schoolmaster, until he shall have taken the oaths appointed to be taken instead of the oaths of allegiance and supremacy, and subscribed the declaration openly in some one of His Majesty's Courts, or as shall be directed by the Governor, Lieutenant-Governor, or Commander-in-Chief for the time being, and if any popish recusant, papist or person professing the popish religion, shall be so presumptuous as to set up any school within this province, and be detected therein, such offender shall, for every such offence, suffer three months imprisonment without bail or mainprize, and shall pay a fine to the King of ten pounds; and if any one shall refuse to take the said oaths and subscribe the declaration, he shall be deemed and taken to be a popish recusant for the purposes so before mentioned.

1786.<sup>3</sup> Then in 1811 the legislature enacted the first Grammar

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3. (1786), 26 Geo. III, c. 1, s. 1. However, s. 2 of the Act retained the obligation to take the oath, which read as follows (at 23 Geo. III, c. 7):

I.A.B. sincerely promise and swear, that I will be faithful and bear true allegiance to His Majesty, King George the Third, and him will defend to the utmost of my power, against all conspiracies and attempts whatever, that shall be made against His Person, Crown or Dignity, and I will do my utmost endeavours to disclose and make known to His Majesty, His Heirs and Successors, all treasons, and traitorous conspiracies which may be formed against Him or them, and I do faithfully promise to maintain, support and defend to the utmost of my power, the succession of the Crown in His Majesty's family, against any person or persons whatsoever, hereby utterly renouncing and abjuring any obedience or allegiance unto the person taking upon himself the style and title of the King of Great-Britain, by the name of Charles the Third, and to any other person claiming or pretending a right to the Crown of these realms: and I do swear that I do reject and detest, as an unchristian and impious position, that it is lawful to murder or destroy any person or persons whatsoever, for or under pretence of their being heretics, and also that unchristian and impious principle that no faith is to be kept with heretics. I further declare that it is no article of my faith, and that I do renounce, reject and abjure, the opinion that Princes excommunicated by the Pope and Council, or by any authority of the See of Rome, or by any authority whatsoever, may be deposed or murdered by their subjects or any other person whatsoever: and I do declare, that I do not believe, that the Pope of Rome or any other foreign Prince, Prelate, State or Potentate, hath, or ought to have, any temporal or civil jurisdiction, power, superiority, or pre-eminence, directly, or indirectly, within this realm; and I do solemnly in the presence of God, profess, testify, and declare, that I do make this declaration and every part thereof in the plain and ordinary sense of the words of this oath, without any evasion, equivocation or mental reservation, whatsoever, and without any dispensation already granted by the Pope or any authority of the See of Rome, or any person whatsoever, or without thinking that I am, or can be acquitted before God or man, or absolved of this declaration, or any part thereof, although the Pope or any other persons or authority whatsoever, shall dispense with, or annul the same, or declare that it was null or void.

Schools Act, which provided for the appointment of school trustees and made mandatory instruction in a number of subjects, which did not include French.<sup>4</sup> In 1826, further progress was made in education when the Act required school districts to erect schools on the request of two-thirds of the ratepayers.<sup>5</sup> In 1832, the legislature further refined the system: each county was to be divided into school districts, which would have a school board, and the province assumed responsibility for financing schools. Section 17 of the Act expressly provided for funding to be paid to Acadian schools in Halifax<sup>6</sup> - the first legislative reference to the reality that the authorities had to tolerate, whether they liked it or not. In 1841, the Act granted a right to public funding to schools where French, Gaelic or German was taught.<sup>7</sup> In 1864, the Public Instruction Act definitely established that public school attendance was obligatory.<sup>8</sup> The 1918 Act create a provincial board of education, but no place was provided for Acadians.<sup>9</sup> This Act also led to the closing of the Acadian schools wherever there was a public school.<sup>10</sup> Although the legislation was disadvantageous for Acadians, as Mr. Bastarache reports:

D'ailleurs les francophones trouvèrent difficilement le moyen de contester la nouvelle loi, même sur le plan de la non-confessionnalité, les Irlandais catholiques s'y étant ralliés et la population francophone étant encore très peu intéressée à l'éducation. Le calme des Acadiens est d'ailleurs en partie dû

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4. (1811), 41 Geo. III, c. 9.

5. (1826), 7 Geo. IV, c. 5.

6. (1832), 2 Gulielmi IV, c. 2.

7. (1841), 4 Vict., c. 43, s. 14.

8. (1864), RSNS, c. 58.

9. See the Education Act, NSS, 1918, c. 19, s. 3.

10. Rawlin and Hafter, Acadian Education In Nova Scotia, Study No. 11, Royal Commission on Bilingualism and Biculturalism, Ottawa, 1970.

au fait que l'instruction de langue française s'est répandue malgré la loi et le programme uniforme, l'unilinguisme chez eux ayant forcé les autorités à faire des compromis.<sup>11\*</sup>

(b) Post-Confederation

Despite the restrictive legislative provisions adopted in 1864, Acadian schools maintained their position in Nova Scotia relatively well.

While there was no notable development in legislation between 1866 and 1980,<sup>12</sup> the Nova Scotian government attempted to control French-language education in the province with a variety of mostly piecemeal measures. Two commissions of inquiry, in 1902 and 1974, made recommendations on the problem. The first commission recommended that there be French-language education for the first four years of elementary school, with English to be the language of instruction thereafter, and that French textbooks be used, and an Acadian inspector be appointed.<sup>13</sup> These recommendations were gradually implemented, but later abandoned. A new and more generous program was established in 1939.<sup>14</sup> In 1974, the Graham Commission advised the government to demonstrate a generous spirit and to provide French-language education for all grades wherever 10% of the population was francophone.<sup>15</sup>

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11. M. Bastarache, Les droits scolaires des Acadiens; in Daigle, J., Les Acadiens des Maritimes, p. 393.

\* Translation:

Francophones found it difficult to contest the new legislation, even on the basis of the provisions for non-denominational schools, since the Irish Catholics had rallied to that cause and the French-speaking population was still largely uninterested in education. The calm response of the Acadians was also partially a result of the fact that French-language education had been extended in spite of the legislation and the uniform school program, since their unilingualism had forced the authorities to compromise.

12. See the revisions of the School Act, RSNS, 1923, c. 29, and RSNS, 1967, c. 81.

13. Rawlin and Hafter, Acadian Education in Nova Scotia, Study No. 11, Royal Commission on Bilingualism and Biculturalism, pp. 22-23.

14. Id., pp. 29-30.

15. Graham Report, 1974, Queen's Printer, Halifax, vol. 8, c. 53.



Nevertheless, the most significant amendments were not made until 1981.

Chapter 20 of the 1981 statutes<sup>16</sup> granted legal recognition to Acadian schools in Nova Scotia for the first time. Even more noteworthy is the fact that while the corresponding legislation in Prince Edward Island and New Brunswick avoided any mention in their respective legislation of the Acadian fact in education in their jurisdiction (preferring the more neutral designations "French instruction" or "education in the official language of the minority") the Nova Scotia legislation defined "Acadian school" and used the expression to mean a school where instruction was provided in French.<sup>17</sup> To our knowledge, this is the first and only official reference in recent legislation to a specifically Acadian reality, thereby giving tacit recognition to the presence of a specific people within the Atlantic provinces.

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16. NSS, 1981, c. 20.

17. The new sections of the Act read as follows:

3. The Lieutenant-Governor-in-Council may
  - (aa) upon the request of a school board, or the joint request of two or more school boards, and upon the recommendation of the Minister, designate
    - (i) as an Acadian school, a school that is within the jurisdiction of the board or one of the boards, and
    - (ii) as the area which is to be served by the Acadian school, an area in which there is sufficient number of children, whose first language learned and still understood is French, to warrant provision of public funds for instruction to be carried out in the French language.
  - and, where the request is from two or more boards, determine the responsibilities of each board in relation to the school.
4. The Minister may
  - (ka) prescribe courses of study and authorize textbooks and related material for use in schools;
  - (kb) determine the ratio of instruction in French to instruction in English in Acadian schools, prescribe courses of study in French and authorize French-language textbooks and related materials for use in Acadian schools.
- 5A. The principal language of administration of an Acadian school and communication of an Acadian school with the community it serves shall be French.

The minister of education in the province also sent draft guidelines to the district school boards respecting implementation of the new legislative measures. The preamble to these guidelines is of particular interest, in that it attempts to provide a definition of Acadian schools in Nova Scotia. However, this definition includes references to the fact that Acadian schools are not exceptional, and should pursue the same objectives as all other schools in the province. This statement of principle should not cause us to lose sight of the fact that the uniform objectives, such as "to live comfortably in society" themselves imply the specific objective of imparting sufficient knowledge of English so that the Acadian student is able to converse in English with confidence and ease - a goal which can only be attained if schools are taught in English.

The guideline states, essentially, that the general objective of Nova Scotian schools is to create responsible citizens and to develop students' potential, and the qualities and skills needed by society (and not necessarily the young person's own qualities, a situation that reflects quite a utilitarian concept of education). The merit in these general objectives is that they include a definition of the distinctive role of Acadian schools:

The distinctive role of the Acadian school in Nova Scotia is twofold: (a) to contribute to the maintenance and a better knowledge of the French language and the Acadian culture in the province and (b) to help the Acadians take full advantage of their linguistic rights.<sup>18</sup> (Emphasis added)

These guidelines then set out four specific objectives: for three of these objectives there is nothing to distinguish them from other documents of this sort (the possession of adequate knowledge of English and French and the development of knowledge and abilities that will assist the young person to participate and contribute to society), but the fourth relates directly to our concern here: "the possession of knowledge and the development of an appreciation of the student's Acadian identity in all its respects."<sup>19</sup>

It took several months for the school boards to approve the principles set out in these guidelines, and in the meantime the minister refused to proceed with designating schools, so long as the guidelines had not been officially adopted, so that francophones were

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18. Revised guidelines for the establishment of Acadian schools in the province of Nova Scotia, Department of Education, October 1984, unpublished.

19. Ibid., par. 2.3.

not able to exercise the rights they had acquired under the Charter.<sup>20</sup> Of course, a lack of administrative guidelines that are not provided for by law cannot impede or delay the exercise of rights that have been formally recognized in legislation. The minister's decision to defer studying cases submitted to him until the official adoption of the guidelines is in law a refusal to exercise his jurisdiction, and is subject to review by way of mandamus or other similar remedy.<sup>21</sup> Pépin and Ouellette note that such failure to exercise jurisdiction may occur by refusal to exercise it on the request of an interested party, or simply by undue delay in giving effect to a decision.<sup>22</sup>

Since the guidelines were adopted, there has been no obstacle to the process of designating schools in accordance with the Act, and in some cases schools have been designated while in others there has been no action.

3. Right of access to French-language schools: obligatory designation

Paragraph 3(aa) of the Act provides that the Lieutenant-Governor-in-Council shall designate a school, which designation is the pre-condition for instruction in French to be provided, on the recommendation of the minister, upon the request of the school board. The power of the provincial cabinet to designate a school appears to be absolutely discretionary, since the condition of numbers applies to the area served by the designated school. By specifying that the request may be made by more than one school board, the legislature has recognized that such an area might not be confined to one school district. The school for which designation is sought must nevertheless, according to the legislation, be within the jurisdiction of a school board. Does this mean that only schools that have already been constructed can be designated, and a board cannot construct new facilities to serve francophones? We shall consider the problem of constructing facilities in the next section.

In general, the provisions of paragraph 3(aa) of the Act do not meet the requirements of section 23 of the Charter. While the Act requires that the request be made by a school board, the Charter provides that a request may be made directly by parents, who may do

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20. Letters from the Nova Scotia Minister of Education to the Fédération Acadienne de la Nouvelle-Écosse (FANE), May 16 and July 18, 1983, unpublished.

21. Education Act, supra; note 16, par. 3(a)(ix).

22. G. Pépin and Y. Ouellette, op. cit., p. 217, and cases cited in the text.

so in the event of a negative decision by a school board that they do not control. In addition, while the Act delegates an absolutely discretionary power to the Lieutenant-Governor-in Council, with no regard for the numbers criterion, the Charter confers a right on parents when a sufficient number of children exist. Thirdly, the Act makes a connection between the number of children in the area served by the school to be designated and the children's mother tongue. However, section 23 of the Charter does not impose any geographical requirement; it is based on the right of the parent and not of the child; and it establishes three eligibility criteria, rather than one. Paragraph 3(aa) of the Nova Scotia Act therefore imposes unjustified restrictions on the ability of the Acadian minority in the province to exercise their constitutional rights. Some of these restrictions (children's mother tongue as the sole criterion; a request by the school board) are not compatible with these constitutional rights, and must be considered to be inoperative in accordance with subsection 52(1) of the Charter. On the other hand, could any of the other criteria be considered as reasonable limits within the meaning of section 1? It does, in fact, seem perfectly reasonable to require some assurance that the children themselves have sufficient language ability before French-language education is offered. We have already raised this question, which is quite familiar to the Acadians themselves, but we noted that it could be resolved by establishing orientation classes for assimilated children, so that they could gradually be integrated into the regular French-language system. To require that the children have French as their mother tongue appears to us to be to deny the rights guaranteed by the Charter, and not merely to limit them.

The mechanism developed by the Nova Scotia legislature to ensure that the educational rights of the French-speaking population are respected - by designating schools - contains a number of violations of the provisions of the Charter, and can be considered to be inoperative.

#### 4. Questions relating to instruction in French

The Act provides that the Lieutenant-Governor-in-Council shall make regulations prescribing the program of education to be provided in schools in the province.<sup>23</sup> However, the minister has the power to "prescribe" courses, the ratio of instruction in French, and the textbooks that will be used in Acadian schools.<sup>24</sup> The minister appears to intend to exercise this power by issuing guidelines. However, Garant and Issalys seem to suggest that when the word "prescribe" is used in an enabling provision it indicates the

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23. Education Act, supra, footnote 16, par. 3(a)(ix).

24. Education Act, supra, footnote 16, par. 4(kb).



intention of the legislature, although somewhat unclear, to delegate a regulatory power. They then state that the fundamental defect is the same in all cases: the information given to the reader is misleading or incomplete; implicit enabling provisions create considerable confusion as to whether a true regulatory power is created.<sup>25</sup> They add:

La recherche du maximum de sécurité et de précision dans l'attribution du pouvoir réglementaire ne saurait s'accorder d'habilitations viciées par une imprécision sur la nature même du pouvoir qu'elles confèrent. L'emploi, même marginal, par le législateur de termes équivoques sur ce point contribue certainement à entretenir l'incertitude actuelle du droit quant à la délimitation des domaines respectifs du règlement et des actes infra-réglementaires.<sup>26\*</sup>

Given the fact that the legislation uses the word "prescribe," we must look to the nature of the delegated power to determine whether it is really of a regulatory nature, to be exercised therefore by regulations, in which case any ministerial guideline would be ultra vires.

There is general agreement in the texts on the definition of a regulation: a normative provision in general and impersonal terms; a guideline, on the other hand, is intended to provide rules of procedure and criteria to be used as guidelines for discretionary powers conferred on the administration.<sup>27</sup>

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25. P. Garant and P. Issalys, Loi et règlement, Laboratoire de recherche sur la justice administrative (No. 10), Quebec City, Faculty of Law, Laval University, 1981, p. 113.

26. Id. p. 137.

\* Translation:

If we are to have the greatest degree of assurance and precision in the regulatory power delegated, enabling provisions should not be viciated by imprecision in the very nature of the power conferred. Use by Parliament, however incidental, of ambiguous terms on such points will certainly contribute to perpetuating the existing uncertainty in the law as to the distinction between regulatory and sub-regulatory powers.

27. P. Garant and P. Issalys, op. cit., supra, pp. 58-60; G. Pépin and Y. Ouellette, op. cit., pp. 63 et seq.; R. Dussault, op. cit., pp. 717-739; Third report of the special committee on statutory instruments (MacGuigan Report), 1969, Ottawa, Queen's Printer, pp. 9-10.

Rules respecting the ratio of French and the courses of study would appear to be of the requisite normative, general and impersonal nature, indicating the intention of the legislature to require the minister to proceed by regulation rather than merely by directive.

In any event, the guidelines provide for ratios of courses in French at the secondary level, that is, a return to the bilingual school. We have noted that section 23 of the Charter, in our opinion, must be taken to exclude this interpretation of the expression "instruction."

In addition, the ratio of French required is relatively low. At the elementary level, section 3.1 of the guideline provides that all courses will be given in French, except, of course, English as a second language, which is taught beginning in grade 3. At the secondary level, first cycle, students take a minimum of 10 courses in French (out of a possible 18 to 20), and specifically three courses minimum per year in French. In the second cycle, the ratio falls under 50% only eight courses must be taken in French, with a minimum of two per year.

The ratios prescribed for the secondary levels do not comply with the right to instruction in French, which is diluted to the point of losing any truly Acadian character. If constitutional guarantees are to have any meaning, they must be implemented in such a way as to give them some effect.

The guideline also provides (subsection 5.2.2) for gradual implementation of the program by grade and/or subject, over a period of up to five years, and the minister has stated that this period could be extended in circumstances requiring delay. Section 1 of the Charter could permit gradual implementation, but five years would seem to be unreasonable delay, given the existing structures in the department.

In Nova Scotia, the minister is responsible for deciding whether to construct new facilities or improve existing facilities, upon the request of a school board and with the approval of the Lieutenant-Governor-in-Council.<sup>28</sup> The Act also provides for the use for school purposes of buildings owned by a municipality, and for the purchase, rental or repair of buildings for school purposes, if the minister is satisfied that it is reasonable to do so.<sup>29</sup> The school board, however, is responsible for managing and maintaining real and personal property.<sup>30</sup> The minister and the school board therefore

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28. Education Act, RSNS, 1974, c. E-2, s.66.

29. Education Act, Id., ss. 43(2), 48(2)(b), 48(7)(d), 66(2).

30. Id., pars. 67(1)(a), (b) and (c).

appear to have concurrent jurisdiction with respect to providing facilities; while the minister may decide whether to construct new facilities, it is the school board which decides whether to use existing facilities. When the board requests that an Acadian school be designated, it could therefore request at the same time that a new building be constructed, or existing buildings be altered; such educational facilities would be "under its jurisdiction" and would comply with the requirement in paragraph 3(aa)(ii) so as to be eligible to be designated as "Acadian schools."

Except for section 5A of the Act, respecting the language of administration in Acadian schools (which is to be French), the reforms in Nova Scotia have not gone any further than the measures implemented in Prince Edward Island, and remain contrary to the provisions of section 23 of the Charter.

#### **IV. French-Language Educational Rights in New Brunswick**





## 1. Fact situation

The French-speaking minority in New Brunswick has had a separate school system only since 1980. The size and geographic concentration of this community, together with a favorable political climate, have provided the opportunity for development of an almost complete independent system.

At the 1981 census, the French-speaking population was 33.6% of the provincial total. French-speaking school children were 32.5% of the total, and a majority of Acadians send their children to French-language schools. Of the schools, 34.6% are homogeneous French-language schools; 36.5% of the provincial school boards are French-language. In addition, 43.9% of the province's school boards provide instruction in French.

Most of the French-speaking population is concentrated in the northwest, northeast and southeast parts of the province. There is also a minority in Saint John and Fredericton.

Since there is a dual school system, the problems of numbers, of the definition of instruction and of the administrative structures do not arise. There are, generally speaking, twin maps of the province for its school system. Where a particular group is only a small minority, there are minority school boards to make up for this absence of geographic concentration, so that the minority always has an autonomous administrative structure.

## 2. Historical development

### (a) Pre-Confederation

The Province of New Brunswick was officially founded in 1784, but it was not until 1816 that the provincial legislature adopted the first school legislation of real significance.<sup>1</sup> This legislation introduced local taxation power for educational purposes in the province, as well as compulsory instruction in the Anglican religion. The primary piece of legislation, the Grammar Schools Act, was revised in 1829; section 17 of that Act removed that requirement, and on the contrary prohibited the teaching of any religion.<sup>2</sup> As in Manitoba, the religious question in New Brunswick soon superseded the language question in battles over education.

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1. Grammar Schools Act, (1816), 56 Geo. III, c. 21, and An Act for Encouraging the Creation of Schools, (1816), 56 Geo. III c. 23.

2. Grammar Schools Act, (1829), 9-10 Geo. IV, c. 29, s. 17.

Were it not for the influence of the Catholic priests and relative tolerance on the part of the government, French-language education would have long ago disappeared in New Brunswick. But motivated by members of the church who were concerned both about preserving their religion and about rousing a national spirit among the people, French-language schools spread throughout the province, albeit sporadically and without any coherent plan. In 1867 French-language education in New Brunswick was a concrete reality lacking only official recognition.

(b) Post-Confederation

While school disputes were beginning to arise in Ontario and Manitoba, the issue came to a head in New Brunswick in 1871. The infamous Common Schools Act<sup>3</sup> attempted to erase, with a single stroke of the pen, all the gains made in retaining some form of French-language education. When this Act was finally adopted by the legislative assembly after two unsuccessful attempts and an election, it imposed universal, English-language, non-denominational education provided free of charge. Section 60 prohibited religious instruction and the exhibition of any religious symbol. Resistance to this Act among Acadians proved to be strong. The Catholic bishops reacted by recommending that their congregations boycott the new schools, and in the early years many people followed these directives.

Mr. Renaud, a member of the provincial legislature, attempted to rely on subsection 93(4)<sup>4</sup> of the Constitution Act, 1867 to have the federal government overrule the provincial legislation. The MacDonald government refused to intervene in a matter that it considered to be within the exclusive jurisdiction of the provinces. Renaud took the case to the courts, arguing that subsection 93(1) of the Constitution Act, 1867<sup>5</sup> protected the rights of the Acadians to retain their denominational schools. The Court of Appeal of New

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3. Common Schools Act, (1871), 34 Vict., c. 21, s. 60: "All schools conducted under the provisions of this Act shall be non-sectarian."
  4. 93(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.
  5. This section guarantees protection for the established rights of denominational schools.

Brunswick (affirmed by the Privy Council) decided to interpret subsection 93(1) literally; in a now famous decision,<sup>6</sup> it held that the BNA Act protected only those schools that were denominational under the legislation in effect in 1867; in New Brunswick, the Parish Schools Act of 1858 (the last significant piece of school legislation before the Common Schools Act of 1871) did not grant any special status at all to denominational schools, which were merely tolerated in New Brunswick. Subsection 93(1) therefore had no real effect in New Brunswick. Nevertheless, the Catholic opposition persisted. It was not until there was an actual riot in Caraquet in 1875, in which a young boy was killed by an English soldier, that the government finally agreed to provide some flexibility in the educational system, which a large part of the population felt had violated their rights. As a result, the wearing of religious habits was permitted in the schools, and religious instruction was permitted before or after regular school hours. This compromise was challenged as being a violation of the 1871 Act, but was upheld by the Court of Appeal of New Brunswick in Roger v. Bathurst School Trustees.<sup>7</sup> The efforts of French-speaking Catholics then turned from the courts to establishing private school systems. With no official recognition, Acadians set up over the years a number of institutions, colleges and organizations parallel to the public systems, which provided them with the security that the provincial government would not guarantee.<sup>8</sup>

In 1966, the various small school units were merged, and the number of school boards shrank from 422 to 33. This merger had a direct impact on French-language education. The homogeneity of the small school boards disappeared, and francophones were often submerged in the new structures. While this reform may be beneficial for the quality of education in the province, it created difficulties in the languages of instruction, since it led to the establishment of bilingual schools, where children from both language groups received a part of their education in each of the two official languages.

The struggle for homogeneous schools then became fiercer in some areas of the province. Gradually, and only after repeated demands, homogeneous French-language schools were opened.

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6. Ex. p. Renaud (1872-73), 14 NBR, p. 273, Conf. Maher v. Town of Portland, (1874), cited in Wheeler, Confederation Law of Canada, 1896, p. 338.

7. [1896] 1 NB, Eq., p. 266.

8. A. Savoie, Un siècle de revendications scolaires en Acadie, Edmundston, published by the author, 1978, vol. I, pp. 230 et seq.



A new factor came into play in the implementation of educational rights: the Official Languages Act<sup>9</sup> was adopted by the legislative assembly in 1973 and proclaimed on December 20, 1976. Section 12 of the Act attempted to settle the schools problem.<sup>10</sup>

This section provided some public, official recognition for the concept of bilingual schools. The struggle then resumed, and not until the Finn-Elliott report in 1979 did the government finally move to establish two parallel, homogeneous school systems.

This report on the restructuring of the New Brunswick school districts was published in 1979; it clearly demonstrated the need to reform the provincial school system and eliminate bilingual districts and schools, which were recognized as powerful tools of assimilation. The third recommendation of the report was as follows:

That all school districts be established on a first-language basis, that is, English or French and that this be prescribed in the Schools Act.<sup>11</sup>

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9. RSNB, 1973, c. 0-1.

10. 12. In any public, trade or technical school

(a) Where the mother tongue of the pupils is English, the chief language of instruction is to be English and the second language is to be French;

(b) where the mother tongue of the pupils is French, the chief language of instruction is to be French and the second language is to be English;

(c) subject to paragraph (d), where the mother tongue of the pupils is in some cases English and in some cases French, classes are to be so arranged that the chief language of instruction is the mother tongue of each group with the other official language the second language for those groups; and

(d) where the Minister of Education decides that it is not feasible by reason of numbers to abide by the terms of paragraph (c), he may make alternative arrangements to carry out the spirit of this Act.

11. Report on the Organization and Boundaries of School District in New Brunswick, 1979, Fredericton, Queen's Printer.

Amendments were in fact made to the Schools Act in 1981 establishing an original system based on language ability. Each school district and each school is supposed to be homogeneous. Where there is a significant minority-language group, the minority may be entitled to set up its own administrative body, the minority language school board.

### 3. The New Brunswick school system

#### (a) Homogeneous school districts and school boards

Section 3.1 of the Schools Act sets out the guiding principle of the reform: "School districts, schools and classes shall be organized on the basis of one or the other of the official languages of New Brunswick."<sup>12</sup> By adopting this approach, New Brunswick appears to have decided on a geographic approach to solving the problem of language, at least in education. The legislature did not confer a right on the individual, but imposed an obligation on the administration, structuring the entire system on the basis of the majority language in a given geographic area. The whole system is based on the geographic division of school districts identified by language, conferring as well significant protection on minorities residing in the district. Except where there is already a minority school board, the school board for a district may administer schools for the other official language, pursuant to section 3.2 of the Act. Paragraphs 12(c) and (d) of the Official Languages Act (cited above)<sup>13</sup> also provide for the retention of bilingual schools. However, classes themselves must be homogeneous, and instruction cannot be provided partly in French with the remainder in English.<sup>14</sup>

Thus it appears that if there is no minority school board within the school district, the main school board must comply with any requests made by members of the linguistic minority in the district for classes or schools in their language. This power appears to be entirely discretionary; no procedure is provided in the legislation to ensure that the process will be implemented. In a case such as this, section 23 may operate to fill the gap and to impose limits on the discretion of the authorities.

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12. New Brunswick Schools Act, RSNB, 1973 c. S-5.

13. Supra, footnote 10.

14. Section 3.2 of the Act provides:

3.2 Notwithstanding section 3.1 and subject to section 3.3, a school board for a district organized on the basis of one official language may provide for persons of the other official language classes or schools in which the language is that other official language.

(b) Minority school boards

The most original feature of the New Brunswick system is undoubtedly the provision in the Schools Act for an entirely new concept: the minority school boards. They are recognized by section 3.3 which reads as follows:

- 3.3 Notwithstanding section 3.2, a school board shall not provide for persons of the other official language classes or schools in which the language of instruction is that other official language when
- (a) school districts organized on the basis of different official languages exist in the same geographical area; or
  - (b) there is in existence in the school district a school board established under section 18.1.

Section 2 of Regulation 81-156 provides definitions for the expressions used:

2. In this Regulation

...

"majority language" when used in reference to a school district means the official language on the basis of which the school district is organized;

"minority language" when used in reference to a school district means the official language that is not the official language on the basis of which the school district is organized; and

"minority language school board" means a school board established in any school district under subsection 18.1(1) of the Act.

It must be pointed out immediately, that like the provisions for application of the Act, this section provides for the establishment of a minority language school board, and not a school. The English version of paragraph 3(b) of the Regulation<sup>15</sup> makes it clear that homogeneous schools must be established before or after the school board is created. The French version itself includes an indication that there could then be schools established, although does not appear to create an obligation to do so.

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15. Regulation 81-156, OC 81-773, 1981 Royal Gazette, Vol. 139, p. 2498.

It would appear from the Act as a whole that the English version is more compatible with its general intent and with the requirements of section 23 of the Charter. Establishment of a minority language school board necessarily requires in that case the prior or subsequent establishment of one or more homogeneous minority language schools. The only legal basis for creation of schools or classes alone is therefore section 3.2 of the Act, as we noted supra.

Paragraph 3.3(a) of the Act prohibits the establishment of minority language school boards when there are already two co-existent school districts in the "same geographical area." This provision would cover a case in which the two linguistic communities in a region were both considered to be of sufficient size to have autonomous school boards, rather than a regular school board and a minority language school board.<sup>16</sup> Thus the school system would remain unilingual, and a school board operating in one language cannot administer schools or classes in the other language.

Section 18.1 of the Act provides the procedure to be followed to have a minority language school board established. Paragraph (b) of this section is noteworthy for the fact that it complies with most of the requirements of section 23 of the Charter.<sup>17</sup>

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16. This is the case, most notably, in the Moncton region, which is about 40% francophone. This region therefore has both a French-language school district and an English-language school district.

17. Subsection 18.1(1):

Notwithstanding section 3.1 and subsection 17(1) but subject to subsection (2), the Minister,

(a) ...

(b) shall establish in a school district in addition to the school board established under subsection 17(1), where parents

- (i) who reside in that school district,
- (ii) whose language is the official language which is not the official language on the basis of which the school district is organized, and
- (iii) who are the parents of not less than thirty children of elementary school age,

submit a request in accordance with the regulations, a school board for the official language group in that school district whose language is not the language on the basis of which the school district is organized within six months of receipt by the Minister of such a request.



Application must be made by the parents, whose language must be considered, rather than the language of the children; the number of children required is not too high, given that the request made is for a school system and not merely a class. The only reservation arises from the fact that the right is limited to a certain number of children of elementary school age, while the Charter also clearly covers secondary school.

This is also the only provision of all those we have studied which imposes a positive duty to act on the minister. Paragraph 18.1(a) reserves to the minister the discretion to act on his own initiative, without regard for the number of children and without receiving a formal request from a sufficient number of parents.

Regulation 81-156<sup>18</sup> supplements the provisions of the Act. It specifies the necessary qualifications for becoming a member of a school board or making a request. Section 3, cited supra, is the relevant section. We have already referred to paragraph (b), which requires a statement from the parents that their children would attend the schools operated by the minority language school board. In our discussion of the general provisions of section 23 of the Charter, we indicated that in our opinion this requirement was a restriction on constitutional rights, in that it restricted the "where numbers warrant" calculation to those children who would attend the institution requested by the parents. Paragraph 3(a) of the Regulation confirms the position taken by the New Brunswick legislature.

While this measure may be justified, on an administrative level, to guarantee that the government's efforts to meet a request will be productive, nevertheless it is a relatively heavy restriction on the ability of citizens in New Brunswick to exercise their constitutional rights. The Charter does not itself specify whether the right provided in subsections 23(1) and (2) is only to be exercised by parents of school age children. This requirement could of course be justifiably considered as a reasonable limit within the terms of section 1 of the Charter; however, while it may be of little consequence in 1985, when there is still an intent to preserve the French fact, this might not always be the case; it certainly is not the case in other provinces where there is a much smaller francophone minority. If we link the exercise of these educational rights to the requirement that there be a request and a guarantee that those making the request intend to renounce their freedom of choice in their children's language of education, and send them to the institution that is being requested, for their entire education, we are in effect circumscribing their rights, and limiting them to circumstances that are not provided in the Charter itself.

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18. Supra, note 15.

(c) Related matters

The province's school system is centralized. The minister establishes the program of study, approves the choice of textbooks and provides the funding.<sup>19</sup> The school boards are responsible for hiring staff and administering programs.

4. Effects of the reform

These provisions were generally well accepted by the people of New Brunswick when they were enacted, and a number of minority language school boards have been established. However, there remain several obstacles to implementation. One of the most serious problems is again the question of bilingual schools, which has recently been considered by the courts; the result has been an important statement about the reform of the educational system in Société des Acadiens du Nouveau-Brunswick v. Minority Language School Board No. 50.<sup>20</sup> This decision merits some attention here, since it is one of the first occasions in which a Canadian court has considered the current educational problems in depth.

The facts may be summarized as follows. In the Grand Falls region in northwest New Brunswick the minority language school board (English) accepted a number of francophones into its regular classes and also into its immersion program. Two Acadian pressure groups, the Société des Acadiens du Nouveau-Brunswick and the Association des conseillers scolaires francophones du Nouveau-Brunswick, objected to this practice and brought an action for an injunction against the school board. The plaintiffs wanted the court to interpret the school reform legislation as requiring unilingual education and abolishing freedom of choice in language of instruction.

In an innovative judgment<sup>21</sup> the Chief Justice of the New Brunswick Court of Queen's Bench, Richard, J., did not go as far as was requested by the plaintiffs.

He did, however, start by acknowledging that bilingual schools are, according to the uncontradicted expert testimony, instruments of assimilation; he then stated plainly: "It is therefore axiomatic that the legislator made his choice in a definitive manner. There are to be more bilingual schools in New Brunswick."<sup>22</sup> This conclusion came after a lucid consideration of both the expert evidence and the legislative provisions in question. Chief Justice Richard did not

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19. Schools Act, supra, footnote 12, ss. 6, 8, 9.

20. (1983), 48 NBR (2d), p. 361.

21. Supra.

22. Op. cit., p. 381.

hesitate to accept the evidence of renowned linguists and senior officials of the department of education, and in so doing he implicitly confirmed the prime importance of this kind of evidence in future Charter cases. He then turned to the evidence respecting methods of learning a second language, and concluded that the presence of francophone students in French immersion courses in an anglophone school is one of the worst ways of promoting additive bilingualism. Since the evidence indicated that it is possible to make an accurate determination of the mother tongue of a pupil and of the child's level of ability in the second language, the chief justice found that this assesment would have to be done by the teachers, and that students should not be admitted to regular classes unless they had adequate knowledge of the primary language of instruction. This conclusion may be applied to subsection 23(1) of the Charter, respecting the right of parents whose mother tongue is French to require that their children be educated in French: the language ability of the parents or children may be determined by appropriate evidence.

However, the nub of the case was actually the question of access by francophones to the schools in an English minority-language school district. The court therefore had to consider whether the educational reforms had abolished freedom of choice for parents as to their children's school system, and if not, whether there was an absolute right to exercise such freedom of choice, or it could be limited in some way.

Relying on section 3.3. of the Act, the court set out the reasons why the approach proposed by the plaintiffs - to deny freedom of choice - could not be accepted. First, speakers of other languages must also be able to attend school; while their mother tongue is neither French nor English, they must still be able to integrate into a school system. The same is true for mixed families (where the spouses have different mother tongues and the children speak both English and French equally well), which are very common in New Brunswick, and also for assimilated children. The proposal that education be unilingual would create great difficulty for them. On the strictly legal level, the chief justice stated:

Section 3.3 gives no indication whatever that the legislator intended to exclude all Francophones from an English school and all Anglophones from a French school. Such an intent would require clear and unequivocal language, and would entail an amendment to section 3.3 or the addition of another section to the present Schools Act.

...

The meaning and purpose of section 3.3, therefore, is to prevent any given school system from teaching its pupils through the use of both official languages as the languages of instruction at the same time. I repeat, this means the end of bilingual schools in our province.<sup>23</sup>

The court interpreted section 12 of the Official Languages Act<sup>24</sup> in a similar manner.

There is therefore still the opportunity to choose a school system in New Brunswick, but at the end of the judgment the court indicated that such choice is subject to a condition that is required by simple logic: a student must have adequate knowledge of the language of instruction in the school system he or she is attending. The most obvious weaknesses in the judgment appear at this point. First, free choice is recognized by the court as being above the Schools Act, but that choice is neither clearly set out in nor supported by the evidence or the case law. The Court refers to the "free choice of the pupils (or parents) to receive their education in one or the other of the two official languages, regardless of their mother tongue,"<sup>25</sup> and states that "the provincial legislator has always been in a position to eliminate the pupils' free choice...;"<sup>26</sup> in paragraph 3(d) of the Regulation<sup>27</sup> the chief justice saw "the intent to confer a free choice."<sup>28</sup> He denied however that "there exists a right to free choice based on custom,"<sup>29</sup> while acknowledging that "free choice is therefore recognized in accordance with present practice;"<sup>30</sup> he concluded by stating that "the parental right to register the pupils in one or the other of the linguistically separate and homogeneous school systems continues to exist in New Brunswick ... ."<sup>31</sup>

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23 Id., p. 400.

24. Supra, footnote 10.

25. Judgment, supra, p. 401.

26. Id., p. 403.

27. Supra, footnote 15.

28. Judgment, supra, p. 403.

29. Ibid., p. 404.

30. Ibid., p. 405.

31. Id., p. 408.



There was no clear evidence at the trial that the people of New Brunswick on the whole believed that there was a practice of free choice, and this fact escaped the chief justice's notice. As well, if this is only a practice, the use of the expression "parental right" in the conclusion of the judgment is unfortunate. In addition, if the intent to preserve free choice emerges from the Regulation, such intent would appear to be in conflict with the Act itself.

There is in fact nothing in Canadian law or the legal literature that would permit us to conclude that at common law any right to free choice in the language of instruction has developed. In general, school boards are responsible for deciding what criteria will be used for assigning children to schools, but the problem has never been posed in terms of language (except in the specific context of Quebec and the provisions of Bill 101 which actually related to specific classes of persons). Given the opportunity offered in this case to reconsider the problem, the court decided the question in a somewhat ambiguous way, adding to the contradictions and appearing to take for a fact, which if it had been more rigorously analyzed, would have been of more benefit to the legal community.

The same can be said of the condition imposed on admission of francophone students to English language schools, that they have an adequate knowledge of the language. Certainly school boards have the power to impose conditions on admission of students, and the cases cited by the chief justice support this finding.<sup>32</sup> However, this is precisely what they have not done in this case, and the court believed that it was empowered to step in automatically to remedy the silence of the legislature which had jurisdiction to deal with these issues. The judgment indicates that "in New Brunswick, eligibility may be regulated by way of the general power provided for in section 6 of the Schools Act."<sup>33</sup>

This power belongs to the minister, and not to the court, and the minister had not yet exercised this power to establish language ability tests. Nevertheless, the court's conclusion was based on the absurd opposite proposition.<sup>34</sup>

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32. Id., p. 404.

33. Id., p. 64.

34. Section 6, supra, footnote 12, provides:  
The Minister

- (a) may prescribe or approve
  - (i) institutional organization and courses for all school districts,
  - (ii) evaluation procedures for instructional organization and courses prescribed or approved under subparagraph (i),
- ...

Having reached this conclusion as regards the interpretation of the relevant sections of these three Acts, it would nevertheless be dangerous to stop there, since one could then conclude that parents have the right to register their children in the school system of their choice, regardless of their level of comprehension of the chief language of instruction. Such a proposition would be absurd. If the legislator did not accept the recommendation to establish linguistic tests, as proposed by the Finn-Elliott (sic) Report, in all likelihood he cannot nevertheless be presumed to have authorized the parents of a unilingual child to freely register the child in a class destined for children of the other language. The rights of the other children would then be adversely affected. However, this risk does not appear to me to be great enough to entail widening the scope of section 3 of the Schools Act beyond its fundamental objective, which is the setting up of separate homogeneous school systems, accessible to those who qualify to attend classes therein. It must also be remembered that the question of eligibility falls within the regulatory power provided for in section 6 of the Schools Act.<sup>35</sup>

The courts have the power to speak where the legislature was silent, but not to legislate on its behalf. If the minister is empowered to enact the appropriate regulation under section 6, it is not for the court to do it: the field is occupied, as the court itself noted. While the Act may "implicitly recognize" the requirement that a pupil have adequate knowledge of the chosen language - although at first glance it may not appear that the Act does recognize this - some indication is needed of the reasoning by which the court reached this conclusion. The conclusion may be accurate, logical and reasonable, but its legal basis is nonetheless tenuous.

Finally, the chief justice delivered an interesting obiter on section 23 of the Charter:

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35. Judgment, supra, p. 402.

In my humble opinion, in New Brunswick the Charter applies only to the right of the Francophone minority to an education in French. Apart from the situations provided for in paragraph 2 of section 23, the Charter contains no constitutional provision dealing with the language of instruction of the majority and in no case does it guarantee the right of the linguistic minority to an education in the language of the majority.<sup>36</sup>

This passage of the judgment indicates that section 23 as a whole is limited in effect to the rights of the francophone minority to receive an education in French, and can "in no case" create a right for francophones to attend English-language schools; however, subsection 23(2) could cover instruction in the language of the majority. We have already raised the problem created by subsection (2), which, it will be recalled, provides that the parents of a child who has received instruction in one language have the right to have all their children receive instruction in the same language. If this provision permits an English-speaking parent to send all his or her children to an English-language school, as the chief justice appears to be saying, why would the same not apply to a francophone whose child is attending an English-language school? The wording of subsection (2) does not prevent this interpretation, and it is hard to see what led the chief justice to say that this possibility would not be permitted in any case. In fact, taken by itself, subsection (2) could give the minority the right to receive education in the language of the majority, subject, however, according to the decision of the court, to the child's language ability.

The value of this judgment is that it clarifies a number of points in relation to educational rights:

- immersion must be provided solely for the learning of a second language, and not for direct instruction in the mother tongue;
- bilingual schools are tools for assimilation;
- bilingual schools have been abolished in New Brunswick;
- parents still have freedom to choose a school system;
- this choice is limited by the pupil's knowledge of the language and ability to take courses in the proposed language of instruction;
- school boards have the right and duty to determine a pupil's language ability and to refuse admission to their system to any pupil whose knowledge of the language of instruction is inadequate;
- the Charter does not confer any right on the minority to receive instruction in the language of the majority.

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36. Id., p. 405.

It therefore appears that, of the three Maritime provinces, New Brunswick has complied most fully with the requirements of section 23 of the Charter, despite the problems that have been noted here. It would seem that in the present circumstances in the province these problems are more theoretical than practical; the thorniest disputes over the interpretation of constitutional rights to instruction in French will not be coming from New Brunswick in the near future.





**V. French-Language Educational Rights  
in Quebec**



Minority-language education rights in Quebec will of necessity undergo considerable change in the near future. The problem of denominational schools is even more acute here than in Ontario. In 1982, a major reform was undertaken, beginning with the publication of the white paper entitled "Une école communautaire et responsable," which was followed by Bill 40, to amend the Education Act, which was not passed; and Bill 3, a modified version of Bill 40, which was passed. The response to this reform was a long and bitter debate involving the unions, federations of denominational school boards, teachers, school principals and parents.

We shall examine here what provision is made for access to English-language schools, what protection is given to denominational schools in Quebec, and what administrative structures are in place. The judgment of the Supreme Court of Thursday, July 26, 1984, in PSBGM v. AGQ will be considered separately, although we shall of course include the decision in that case in our consideration of the system.

# 1. Fact situation

The CEMC Report indicates that all school bodies in Quebec are organized along denominational lines; they are not separate schools per se, since there are two parallel systems under the same set of rules. The right of religious dissent is set out in the Education Act, but has been exercised on only six occasions. This right is protected by section 93 of the BNA Act, 1867; it permits a group of parents to establish and support a school that is not of the same denomination as the school district. The division of the entire Province of Quebec into school districts based on denominational considerations may not be in compliance with the Constitution, as we shall see.

While there is generally a correlation between religion and language in Quebec, the rule is not without exceptions. The CMEC Report indicates that there are 213 Catholic school districts, and that 6% of the pupils in those districts are English-speaking. There are 31 Protestant districts, with a French-speaking pupil population accounting for 8% of the total. The Protestant side administers 14 French-language schools.

English-speaking Quebecers have access to 397 schools in the two systems; in 85% of those schools, English is the only language used, leaving 63 mixed schools (where there is a vice-principal for the minority group). English-speaking pupils are concentrated within the CECM, the BEPGM and in Baldwin-Cartier. The report indicates that apart from the 8% who are French-speaking, 25% of the pupils in the English system have a first language that is neither English nor French. There is no explanation of whether these data include what are called "illegal" pupils - those who do not meet the admission criteria set out in Bill 101 or section 23 of the Charter.



There are 10 English-language local school boards (elementary only) and 38 local school boards that manage both English- and French-language schools; there are four English-language regional schools boards (secondary only) and 14 that manage both kinds of schools; and there are four English-language integrated school boards (elementary and secondary) and 23 that manage both kinds of schools. Clearly, bilingual school boards are the rule rather than the exception.

There are no integrated structures for anglophones within the department, although there is consideration of this. Associate deputy ministers are appointed on the basis of religion. Programs are developed jointly, and an English-speaking education officer always participates. The Montreal regional office of the department, which is staffed largely by English-speaking personnel, provides services to other English-speaking school boards to assist in developing programs and learning material.

In general, these structures are similar to those in place in Ontario, although there is some difference in terms of decentralization of power. Quebec does not provide any greater rights for its minority in the management of structures in the educational system than does Ontario. Division of the system by religion rather than language has created a system in which the Catholic system, where the majority is French-speaking, manages schools for the linguistic minority in Quebec, and the English-speaking Protestant system manages schools for the linguistic majority. (We cannot say whether these schools serve French-speaking pupils who are in a regional minority.) Under Bill 101, English-speaking Quebecers had no legal rights, as a group, to homogeneous schools and school boards. They can exercise these rights as Protestants only. Like Franco-Ontarians, they have no structure identified by language within the department of education; they have an associate deputy-minister of their own only in so far as that person is Protestant. The Protestant school boards appear to have adequate resources to be able to perform their role, which is in fact if not in law to provide instruction in English. Courses of study are common to the two systems and are published in both languages. English-language students have access to a good system of colleges, CEGEPs and universities.

In addition, as we shall see, there are very few Protestant institutions that are protected by section 93 of the BNA Act, 1867. The cases to date have indicated that constitutional protection for Protestant schools includes, as in Ontario, the right to dissent, and also covers those structures that were denominational in 1867; as we shall see from PSBGM v. AGQ, infra, there were very few such structures at the time. It would therefore be possible to strip the denominational school system in Quebec of much of its powers without seriously violating section 93; it would only be necessary to ensure

that the institutions that were protected in 1867, and the right to dissent, were not affected. With respect to language, if the new educational reform is to comply with the Constitution it will have to provide anglophones with English-language school boards, and possibly with structures within the department of education.

## 2. Denominational rights

There have been two significant phases in the case law respecting denominational rights in Quebec; the first, in the 1920s, coincided with developments elsewhere in Canada and with the numerous rulings of the Privy Council on the interpretation of section 93 during that decade. The second is more current, and is taking place in the context of the debate over language rights in Quebec centering on Bills 63, 22 and 101. There has only been one case that deals directly with denominational rights.

In Hirsch v. Protestant Board of School Commissioners of Montreal<sup>1</sup> some direction was provided on certain aspects of section 93 as it affects Quebec. This was a reference by the Lieutenant-Governor-in-Council to the Court of King's Bench, Appeal Division, concerning an Act passed in Quebec in 1903,<sup>2</sup> providing that Jews would be treated as Protestants, for school purposes. The Protestant school boards challenged this Act for economic and religious reasons. Specifically, they believed that providing instruction for people of the Jewish religion would cost them more than the taxes they could collect from those people. A commission was appointed, on which Catholics, Protestants and Jews were represented; it was divided in opinion as to the validity of the statute, and recommended the reference. Seven questions were submitted to the court, of which six are of interest to us here:

1. Is the statute of 1903 ultra vires?
2. Under the statute, can Jews be appointed to the Protestant Board of School Commissioners of the City of Montreal? Is the board obliged to hire Jewish teachers?
3. Can the province pass legislation permitting Jews to be appointed to the school board or to the Protestant Committee of Public Instruction?
4. Can the province pass legislation obliging the school board to appoint Jews to management positions?
5. Can the province pass legislation to establish separate schools that are neither Catholic nor Protestant?

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1. [1928] AC, p. 200.

2. 3. Ed. VII, c. 16.

6. If the Act of 1903 is ultra vires, have the Protestants the right to admit Jews to their schools

(a) as a matter of grace?

(b) as a right?

(c) can the province force them to do so?

The lower courts had given a variety of answers to these questions. Any consideration of those decisions would be too lengthy for our purposes here, and we shall therefore consider only the judicial committee decision.

The judicial committee began by determining whether the schools affected by these Acts were denominational and therefore covered by 93, and if so, which schools were affected.

The 1863 school statute established two systems in Lower Canada: one for the rural area and one for Quebec City and Montreal. The rural system provided for religious dissent, and the others were common schools; there was no limit on the numbers required to exercise the right of dissent. Funding was obtained by tuition fees, grants and taxes. Teachers were hired by the school board after being examined by the Board of Commissioners for the county, which board could be divided into Protestant and Catholic halves by the Lieutenant-Governor-in-Council. The clergy had the right to choose religious books and courses, and could visit the schools of their denomination. Admission to dissentient schools was reserved to people of the same religion. Those people who supported dissentient schools therefore had the right, protected by 93, to elect trustees, hire teachers and exclude pupils who were not of the common religion. (At this point, we might note that the Privy Council appeared to indicate that only those people who supported separate schools in 1867 had the constitutional right to maintain their schools.) On the other hand, although the rural schools that were not dissentient schools were Catholic, they were in law "common schools" with no denominational obligations. The Privy Council here followed its earlier opinion in Maher v. Portland,<sup>3</sup> that de facto denominational schools did not come within the provisions of 93.

In Montreal and Quebec City, the Act established two denominational school boards. Each board was entitled to manage its own schools. The fact that people of another religion attended such schools did not efface the denominational stamp set upon it by the Catholic or Protestant trustees. On the delicate question of the territory over which this protection extended, the Privy Council abstained from giving an opinion, but indicated obiter that any annexation of a city could not deprive any class of person of the protection afforded by 93. Did the judicial committee of the Privy

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3. Wheeler, Confederation Law of Canada, p. 338.



Council intend by this that only those schools that were already denominational before annexation could remain intact, or that any Catholic or Protestant community in the present territory of Montreal and Quebec City has a constitutional right to participate in the system of its own denomination?

Thus the judicial committee's opinion is not conclusive on this point, and we shall see that Quebec intends to put forward arguments for a reduction of the territory of the denominational school boards in these two cities, to which the boards are, of course, strongly opposed.

Finally, the judicial committee denied Jews the right to participate in establishing or managing Protestant schools, but gave them the right to attend such schools. It also stated that in its opinion the province had the right to provide for the establishment of non-Christian school systems, this right not being protected in 93, refers only to the rights of the Catholic and Protestant population at the time of Union.

It is clear from this opinion that the Montreal and Quebec City systems are fully protected, except for their respective boundaries. The status of schools that have become denominational by the exercise of the right of dissent since 1867 is less clear. Sections 55 to 72 of the present Education Act<sup>4</sup> have continued guarantees of the right to dissent, with some modification. We would have to conclude logically that outside Montreal and Quebec City the present right to dissent is protected by 93 throughout Quebec, as in Ontario. However, and in contrast to Ontario, the number of dissentient schools that have actually been established in Quebec is not very high. This fact could be explained by the low number of Protestants in the province, and the fact that the system is already denominational.

While the Act provides an organization and structure for the right of dissent, what exactly is the situation for non-dissentient Protestant schools? If their denominational nature is to be taken away, can they assert their right to maintain a separate denominational school system? Catholics are also protected by 93(1); what about Catholic schools? In 1867 they were not de jure Catholic, so that even if the Act were today to grant them denominational rights, that status would not be protected by 93.

In Perron v. Syndics d'Ecoles de la Municipalité de Rouyn<sup>5</sup> the court confirmed the opinion expressed in Hirsch that all non-Catholics must be treated as Protestants for school purposes. The group in question was Jehovah's Witnesses, who were to be treated as Protestants but only for the purposes of admission to school; following Hirsch, this "analogy" cannot be extended to include school management or the establishment of schools.

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4. RSQ, 1977, c. I-14, continued by Bill 3.

5. [1955] BR, p. 841.



There have been two important decisions in Quebec, in 1976 and 1980. The first dealt with an aspect of 93 that had already been decided: the absence of any language component; the second dealt specifically with denominational rights.

In PSBGM v. Ministre de l'Éducation du Québec,<sup>6</sup> Chief Justice Deschênes presented a definitive analysis of the rights conferred by 93. He summarized the case law in each of the provinces, in a passage that has been referred to on numerous occasions:

- (a) for the religious minorities in Saskatchewan and Ontario, the courts have stated that they must show prejudice in order to challenge successfully any legislation that they allege contravenes section 93;
- (b) for the Catholic minority in New Brunswick, the courts have stated that they must provide evidence of religious rights specifically enshrined in law, and not simply a de facto situation or mere tolerance;
- (c) for the Catholic minority in Manitoba, the courts have stated that they must provide evidence of religious rights that existed before Manitoba entered Confederation;
- (d) for the Catholic minority in Ontario, the courts have stated that language is distinct from religion, and that only religion is protected by section 93;
- (e) for the Jewish and Protestant minorities in Quebec, the courts have stated that they must also demonstrate pre-Confederation rights, and not mere tolerance; that religion, and not language, is the basis of the protection in section 93, but that within these constraints there is freedom of conscience in Canada.<sup>7</sup>

This summary, together with the content and context of 93, is the basis for the court's restatement of provincial jurisdiction over education, including language, and exclusion of any language element from the protection provided by 93. In order to determine the nature of these rights in Quebec, the court traced the pre-Confederation history and development of the Quebec school system, as in Hirsch but in greater detail. The Chief Justice described education in Canada at the time of Union in 1867 as follows:

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6. [1976] CS, p. 430.

7. Ibid., p. 444.

Dans le Haut-Canada, un système d'écoles publiques non-confessionnelles et un réseau parallèle d'écoles séparées confessionnelles, toutes soumises au Conseil de l'instruction publique. Dans le Bas-Canada, un système d'écoles confessionnelles à Montréal et à Québec; ailleurs, un système d'écoles publiques non-confessionnelles et un réseau d'écoles dissidentes confessionnelles; toutes sont soumises au Conseil de l'instruction publique.<sup>8\*</sup>

The powers of the two councils were very extensive, and applied to both systems. At the local level, trustees had jurisdiction over buildings, teachers, materials, implementation of programs or supplementary programs, local taxation. Certification of teachers was centralized, and the central authority also passed rules of general application. Rivard, J., of the Court of Appeal of Quebec, described the basis of the system by saying that Christian control and instruction appeared to have been the desire of the legislature before 1867, and to have been the intention of the Constitution for the future.<sup>9</sup>

The correlation between language and religion is not so evident today, and despite 93(1) the province has the power to adapt its educational system to modern reality; however, the right to dissent protected in 93 and preserved in the Education Act is essentially a religious right.

It appears from this decision that the rights protected in 93 cover the establishment of separate schools based on religion, and that management of these schools includes those aspects of school management that they controlled by virtue of pre-Confederation school legislation, as entrenched in section 93 of the BNA Act, 1867. Any attempt to diminish these rights would conflict with 93(1). The opinion of Deschênes, C.J. on these questions will become a little clearer in the next case.

In Clément-Séguin v. Procureur Général du Québec,<sup>10</sup> an interesting approach was taken to the nature, rather than the content, of the protection of denominational schools in 93. The question was asked directly: what is a denominational school? How is denominational status acquired in Montreal (and by analogy in Quebec City)?

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8. Ibid.

\* Translation:

In Upper Canada, a public non-denominational school system and a parallel separate denominational school system, all under the Council of Public Instruction. In Lower Canada, a denominational school system in Montreal and Quebec City; elsewhere, a public non-denominational school system and a dissentient denominational school system; all were under the Committee of Public Instruction.

9. P. 514, as cited in the judgment, p. 447.

10. [1980] CS, p. 443.

Although this case is less well-known and less frequently cited by judges and lawyers, it is very important in understanding 93. The facts were complex, but may be summarized as follows. Notre-Dame-des-Neiges school in Montreal wanted to undertake an educational project that would be pluralist rather than Christian, and to introduce religious/moral options rather than exemption from religious instruction, and to revoke the denominational nature of the school. These requests were contrary to the rules of the Catholic committee of the Conseil supérieur de l'éducation, the provincial advisory body in the department and the overall governing body for the denominational nature of the schools in the province. The Commission des écoles catholiques de Montréal, which is denominational both by name and by law, was extremely displeased.

These two bodies ruled on the request. The Catholic committee revoked the school's denominational status; the CECM modified its policy on the denominational status of schools under its jurisdiction, and held that they were all de jure denominational and Catholic, and that therefore no request for revocation could affect the Catholic nature of the system.

The court made reference to a number of well-known religious sources, and considered the question of the definition of the denominational status of the schools and the "Christian educational project." This revealed a continuing and overriding concern with imbuing all aspects of school life with the Christian values of the church. Religion went beyond instruction in religion as a subject, and inspired the content of other courses, the conduct of teachers (including their private life, if it affected their professional life), and extra-curricular activities. The court's statements on this point are incisive and enlightening. Thus the question becomes whether 93 contemplated this kind of instruction - in other words, whether the pre-Confederation right was to include the denominational nature of the schools.

The court first summarized the provisions of 93, and described the nature of denominational school rights in 1979:

Non seulement celle-ci n'est-elle pas générale, mais elle n'est pas généralement garantie; ainsi:

- a) Il ne reste au Québec que six commissions scolaires dissidentes, trois catholiques et trois protestantes. Dès lors, à l'exception de ces six dissidences, tout le territoire du Québec, hors Montréal et Québec mêmes, échappe à la garantie de confessionnalité de l'article 93. Le législatrice pourrait valablement y abolir la confessionnalité scolaire en totalité.

...

Voilà donc le territoire restreint où la garantie confessionnelle de l'article 93 s'applique au Québec: à Montréal, à Québec et dans les six dissidences qui existent encore.<sup>11\*</sup>

This passage provides an answer to the question raised in Hirsch and in PSBG: it is not merely the right of dissent that is entrenched, but also the denominational systems themselves that existed in 1867 and continue to exist today. De facto Catholic schools are not protected; what is protected is the legal rights of religious minorities in 1867. This means the right to establish their own schools and to maintain the denominational schools that have been established according to the right that was granted in the legislation. Although the Privy Council's decision did not explicitly contradict the opinion of Deschênes, J., we believe that the spirit of 93 and a liberal interpretation of a constitutional guarantee of minority rights were exceptions to provincial jurisdiction over education, and support the argument for entrenchment of the **rights** of Catholic and Protestant minorities - the right of dissent.

Thus outside Quebec City, Montreal and the six dissentient boards, the system is neutral, but it has been argued that the legislature could abolish the denominational systems, without restriction and **entirely**. It could do so, but in our opinion it would have to preserve the right to religious dissent, so that new denominational schools could be established. This possibility raises an interesting question: could Catholics demand denominational schools where the majority system is neutral?

The court restricted its final opinion to the situation in Montreal, noting that the schools there had and still have the following rights:

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11. Judgment, p. 451.

\* Translation:

Not only were denominational schools not the rule, but they were not generally guaranteed:

(a) There remain in Quebec only six dissentient school boards: three Catholic and three Protestant. Thus, with the exception of these six cases, the entire territory of Quebec, outside Quebec City and Montreal, falls outside the guarantee of protection for denominational schools set out in section 93. The legislature could make valid legislation to abolish denominational schools entirely.

...

Here we have the limited territory where the guarantee of denominational schools in section 93 applies in Quebec: in Montreal, in Quebec City, and in the six remaining denominational school systems.



1. A school board with Catholic trustees for Catholics.
2. A Catholic Board of Examiners.
3. Catholic student teachers.
4. Certificates issued to Catholic teachers only.
5. Religious and moral books to be chosen by Catholic clergy alone.
6. The right of Catholic clergy to visit the schools.
7. Allocation of financial resources in proportion to the Catholic population.<sup>12</sup>

Although there is no reference to a Christian educational project, statements by the church and politicians of the time, together with these provisions as a whole, indicate that the Catholic schools of 1867 were similar to the Christian educational project. Catholics today therefore have a right to implement such a project, and that right is protected by 93. Section 93 is a guarantee of the structures as well as a Christian philosophy of education.

The CECM was the legal successor of the 1867 corporation of Roman Catholic trustees, and so it was legally a denominational system. No one can take away that status; the same was true for the schools under its jurisdiction. The question was therefore the extent of that jurisdiction. In the opinion of the court, annexation of territory into the city of Montreal automatically brought the schools in the annexed area under the authority of the CECM; if this were not so, the double CECM school system that existed in law, based on "artificial boundaries," would create a situation "of utmost injustice, strange and entirely unacceptable."<sup>13</sup> The creation of the Comité Catholique du Conseil Supérieur de l'Éducation in 1964, with power to recognize and revoke denominational status, changed nothing. The decision to recognize a school's denominational status is "superfluous and inoperative," and the provisions that granted such powers to the CECM were "futile, inapplicable and inoperative."<sup>14</sup>

However, since school attendance is compulsory, non-Catholics are entitled to have access to the schools in the system of the school municipality where they reside, and they may be exempted from religion courses. Establishment of a non-denominational school system would also be completely legal.

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12. Ibid., p. 452.

13. Ibid., p. 459 (translation).

14. Ibid., pp. 460-461 (translation).

We may conclude from this decision:

- in Montreal, Quebec City and the six dissentient school boards, the schools and the management structures in place are Catholic or Protestant by law;
- the nature of denominational schools includes a religious environment and power over the religious nature of instruction in the schools;
- Deschênes, J. appears to have stated that only those institutions that were already denominational in 1867 enjoy the constitutional protection provided by 93.

Finally, before ending the part of our study devoted to denominational rights in Quebec, we must consider the financial aspects. In Greater Hull School Board v. Attorney-General of Quebec,<sup>15</sup> a final opinion was added to the jurisprudence under 93. This decision concerned the validity of certain sections of the Act respecting Municipal taxation.<sup>16</sup> In a rather inconclusive judgment, a majority of two judges of the Court of Appeal found that these provisions were ultra vires. In the opinion of Kaufman, J., the restrictions placed on the power of the school boards to impose taxes could not be allowed to stand. To "run" a school requires adequate funding, and any significant restriction on the power to raise the funds necessary for this purpose ipso facto affects, prejudicially, the degree of control which boards and commissions exercise over their schools. The boards and commissions are subject in their actions only to the law, their conscience and the electoral process, and nothing more. The introduction of a financial referendum cannot save the legislation.

Malouf, J. gave a very detailed opinion. The legislation provides for financing by grants; school taxation becomes a supplementary method subject to the condition that it be limited to 6% of the school boards' net expenses, and that the boards may only exceed this ceiling with the approval of the school electors expressed by referendum.

Malouf, J. clarified the problem, referred to supra, of the right of dissent. The Quebec government adopted the restrictive position taken by Deschênes, J.. Malouf, J. rejected this position: pre-Confederation legislation provided the right to dissent, a legal right that is entrenched in our Constitution and that is not limited

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15. (1984), 6 DLR (2d), p. 204 (Que CA), and (1985), 15 DLR (4th), p. 651 (SCC).

16. SQ, 1979, c. 72. These sections affected only the power of the school boards to tax, so that if the amount of taxes they may wish to impose exceeds 6% of the expenses paid by the province, they must hold a referendum.

by any territory or numbers, however small they may be. This is a right of dissent conferred on parents, and has at all times been considered to be crucial, a "basic and fundamental right."<sup>17</sup> He noted that at that time it was a question of utmost importance to the local population. This right still exists in the law today.

Pre-Confederation legislation provided for three sources of school funding: grants in proportion to the pupil population; taxes levied from dissentients; and tuition fees. The power to levy taxes was twofold: a tax equivalent to the per capital grant, and an additional tax in the discretion of the trustees, to support their schools.

The court noted that the rights of Ontario Catholics were narrower on this point: they had to obtain special authorization from taxpayers to levy taxes. Subsection 93(2), which gave religious minorities in Quebec the same rights as Catholics in Ontario, cannot be used to abrogate any rights that were enjoyed by dissentients in Quebec prior to Confederation.

Referring to Hirsch and Tiny, the judge arrived at the following conclusions:

1. In 1867, the classes of persons referred to in 93 possessed by law the right to control their schools.
2. Such control was exercised by trustees.
3. Among the privileges and rights possessed by the trustees were the following:
  - (a) the right by law to receive their proportionate share of grants;
  - (b) the right to determine the level of funding appropriate for each school under their control;
  - (c) the right to raise by property taxes the required funds to manage their schools;
  - (d) the right to fix school fees not in excess of the amount stated in the Law of 1861.<sup>18</sup>

These rights are as important today as they were at the time the judgment was written.

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17. Ibid., p. 216.

18. Ibid., pp. 224-225.

Bill 57 went beyond restricting and circumscribing these rights: it denied them. The relevant provisions are as follows:

1. Section 495 of Bill 57 took away all powers of taxation not provided for in the Bill. This is a direct contravention of the rights guaranteed in 93.
2. Bill 57 did not provide for any grants or for proportional division of grants; the trustees were given no control over the level of funding, and their right to raise the funds required by taxation was taken away.
3. The minister of education could fix the level of expenses qualifying for grants simply after consultation with the trustees.
4. The power to impose the tax and surtax was abolished.<sup>19</sup>

Vallerand, J. wrote a very clear dissenting opinion. He noted that 93 indeed entrenched a particular right, but that it did not guarantee the modalities of expressing the right. He agreed with the majority that unlimited access to the financial resources necessary for the maintenance of denominational schools is an essential condition to the exercise of the right of access to and maintenance of such schools. In his opinion, the difference was that Bill 57 in no way limited these rights. Generous government grants, the primary source of school funding, were added to the power to raise the necessary taxes, and a referendum is not a denial of the right to levy taxes for education needs beyond those provided for. The Act respecting Grants to School Boards<sup>20</sup> provides for further grants. A funding referendum could be an acceptable mechanism of consultation; the legislature made a political choice, and the judge could not find that an appeal to the community to permit the school board it controls to extract an unlimited contribution by way of property taxes was a hindrance to its constitutional right to do just that. Thus this was simply a rearrangement of the provisions for raising funds for schools, and did not prejudicially affect the powers of the school boards.<sup>21</sup>

As may be seen, the vigorous dissent registered by Vallerand J. diminishes the strength of the judgment, particularly since the reasons of the other two judges were not in clear agreement.

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19. Ibid., pp. 225-226.

20. RSQ, 1977, c. S-36.

21. Barrett v Winnipeg (1891), 19 SCR, p. 363.



The decision of the Supreme Court was rendered on December 20, 1984. The court found that the provisions that had been challenged were unconstitutional, but for rather more restricted reasons; again there were two varying opinions. Although the question is complex, technical and limited to Quebec, the judgment will have an effect on Quebec's new Bill 3 and on the approach that the Supreme Court will take in interpreting section 93 of the BNA Act. We shall therefore devote some time to a consideration of this decision.

The majority judgment was written by Chouinard, J., who noted that the disputed sections were designed to replace the school financing system, which was based on taxation, by a system based on grants. The minister had a duty to make budgetary rules, in his discretion, determining the amount of expenses allowable. Any expense not covered by grants had to be recovered by the school boards through taxes, which the boards had to submit in a referendum any proposed assessment exceeding 6% of the net expenses of the school board, or 25 cents per 100 dollars of assessment.

A general budget was to be prepared by the municipal council of the Island of Montreal from the budgets of the school boards and from its own expenses.

The judgment was written in six large parts: application of section 93 of the BNA Act (of relevance for other provinces); the lower court judgments; the extent of the protection provided by 93 (religion or management); the law in Quebec in 1867; answers to the four arguments against the legislation; current application of 93. We shall consider these parts, but without reviewing the judgments of the lower courts that have already been discussed here.

The conditions in which 93 will apply are set out concisely in the judgment:<sup>22</sup>

1. There must be a right or privilege affecting a denominational school;
2. enjoyed by a particular class of persons;
3. by law;
4. in effect at the time of the Union of the territory with Canada;
5. which is prejudicially affected by the legislation.

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22. (1985), 15 DLR, p. 651 at p. 657.

We have discussed these propositions elsewhere, and we believe that this analysis is supported by the case law. The question of section 93 in Quebec can be settled quickly: in 1867, all common schools in Montreal and Quebec City were denominational; everywhere else only the dissentient schools were denominational, and common schools were not. We support these comments, and would add only that in our opinion the right of dissent is included in 93.

The question of the effect of 93 on management has a number of aspects that concern us, and that are affected by section 23 of the Charter. The Attorney General submitted that section 93 did not protect the religious aspect of the schools.<sup>23</sup> The Supreme Court dismissed this argument out of hand: "Denominational status does not exist in a vacuum. Section 93 guarantees the rights and privileges relating to denominational schools."<sup>24</sup> The judge referred to Hirsch and Tiny, and stated: "Denominational status applies in its context, and though some legislation which does not prejudicially affect a right or privilege conferred by law at the time of the Union is conceivable, other legislation will have such an effect."<sup>25</sup> As a result, it was the court's opinion that the rights of the school boards in 1867 over taxes and grants must be reviewed to determine whether the new provisions prejudicially affect these rights.<sup>26</sup>

In our opinion, section 23 of the Charter should not be analyzed by analogy to the reasoning used here for section 93 of the BNA Act in considering the rights of francophones in 1982. We can only use history to find the mistakes and mischief that 23 was designed to correct. However, in my opinion we could paraphrase the Supreme Court, to say that "French-language instruction does not exist in a vacuum." If the Constitution protects the rights of denominational schools, a fortiori it must protect the rights of French-language schools.

To return to the decision: in his review of history, Chouinard, J. stated: "The right of Protestants and Catholics to direct and control their own denominational schools was therefore recognized by law at the time of the Union"<sup>27</sup> - a conclusion that can hardly be challenged. However, the real nub of the dispute here was school funding, which came from three sources: grants, taxes and school fees. Grants were paid according to an objective criterion: the proportion of school attendance or of the population. Secondly, the common schools **had a duty** to collect taxes in an amount equivalent to the grants, while schools in Montreal and Quebec City received this amount in additional grants. Thirdly, all local school authorities could freely raise more money through taxes or school fees.

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23. Clément-Séguin v. PCQ, [1980] CS, p. 443.

24. Op. cit., p. 658.

25. Id., p. 659.

26. Id., p. 659.

27. Id., p. 660.

Did the new system proposed by Quebec affect these rights in a manner that contravened section 93? The Greater Hull School Board claimed that it did, and submitted four arguments in support of the objections of the denominational school boards:

1. Since the minister of education sets the level of grants in his discretion, the school boards no longer have the right to determine the level of their expenses;
2. the Act does not provide for grants as of right;
3. the right to grants being made on a proportional basis has been abolished;
4. the right to tax for funding beyond the basic financing is rendered illusory by the requirement of a referendum.

The court dismissed the first two of these four arguments. Before 1867, the minister of education also determined the amount of grants in his discretion, and the question was grants and not expenses; the boards were free to make other provision for collecting expenses not covered by direct funding. The new legislation maintained the right to receive grants.

The court then gave more detailed consideration to the other two arguments. Chouinard, J. accepted only the argument dealing with proportional allocation of funding, while Le Dain, J. affirmed the opinion of the Court of Appeal with respect to the referendum provisions.

In the opinion of Chouinard, J., proportionality was the crucial point: "Proportionality is more significant. Whether on the basis of total population or that of school attendance, the principle of a fair and non-discriminatory distribution is recognized."<sup>28</sup> Since the new rules did not provide for it expressly, they could not stand, even if the minister intended to respect this principle. It is a right guaranteed by section 93. Incidentally, although this opinion is based on the law in effect in 1867, it establishes a principle that could be applied advantageously to section 23 of the Charter: fair and non-discriminatory distribution of funds between anglophones and francophones.

Proportionality based on attendance has the merit of connecting needs and funding, but can have the indirect but nonetheless real consequence of involving schools and school boards in epic struggles to recruit students. We might find a French-language school board being tempted to expand access to French-language schools and thus endanger their homogeneity. Proportionality based on population might better respect the spirit of 23, in that it would connect funding to population, even if the children of some francophones preferred to attend English-language schools. However, this formula does not account for pupils who come from other school districts.

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28. Id., p. 663.

The eventual choice of an appropriate method will be a matter of administrative rather than judicial concern, and it will be sufficient for the method chosen to comply with the principle of proportionality.

The requirement that a referendum be held was the basis for the Court of Appeal's decision to quash the legislation, and the point on which Vallerand, J. dissented. Here, we find the reverse situation: a majority of the Supreme Court upheld the referendum requirement, with Le Dain, J. and Lamer, J. dissenting. There are a number of interesting reflections on the nature of the rights guaranteed by 93, as the court looks for a way to resolve this problem. Our interest in this passage of the judgment is twofold: again, it establishes parameters for the powers of provincial legislatures over education, and as well, it indicates the thinking of the court on the nature of constitutional guarantees respecting education. We will find these comments useful when we deal with the substance of section 23.

The school boards challenged the referendum procedure imposed, on three grounds:

- (a) there was no such limit in 1867, and it could not now be imposed;
- (b) the procedure is so cumbersome that it is unrealistic; accordingly it is an impediment to the taxing power;
- (c) any elector would be entitled to vote, regardless of religious affiliation.

The court considered these arguments one by one, and accepted only the third, and only to a very limited extent at that.

The court stated, on the first argument:

The principle of a referendum itself is not in my view such as to constitute an infringement of the taxing right, making the legislation unconstitutional. There is no limit on the taxing right. It is only that the legislator has thought it proper to confer a supervisory power on persons who, in fact, are members of the class of persons whose rights are protected.<sup>29</sup>

This passage affirms the decision of Vallerand, J., who dissented in the Court of Appeal, and introduces the distinction between the rights of the protected class and the rights of their school administrators. The Supreme Court adopted the comments of Pierre Carignan, the Director of the Centre de recherches en Droit public of the Université de Montréal, who analyzed the judgment of the Court of Appeal on the basis of the distinction between individual and collective rights, a distinction that will be relevant

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29. Id., p. 664.



to section 23. In a study cited by the Supreme Court, De la notion de Droits Collectifs et de son application en matière scolaire au Québec, September 1984,<sup>30</sup> Professor Carignan disputes the argument that the protection of section 93 is guaranteed to school boards rather than to the electors:

This position is, to say the least, suprising. The constitutional protection exists for the benefit of religious communities. More specifically, it benefits Roman Catholics and Protestants in the cities of Montreal and Quebec and dissentients outside those cities. Accordingly, commissioners and trustees are only the representatives of the real beneficiaries. Moreover, if one refuses to lift the veil of legal entity and regards the school boards as the ultimate holders of the taxing right, since the latter do not constitute a class of persons they are not in a position to invoke the constitutional protection.<sup>31</sup>

In a separate opinion, Le Dain, J. dealt further with this question, and we would tend to prefer his approach as it is more in line with the case law and the nature of the school system:

I would agree that school commisssioners or trustees are not themselves a class of persons contemplated by s 93(1) of the Constitution Act, 1867, but they are the representatives of such a class for purposes of the management of the denominational schools, and the rights of the class in respect of such management at Confederation are necessarily to be determined by reference to the powers of management conferred by law on school commissioners and trustees, through whom the class exercises its rights. It is for this reason that it is customary to refer, as in the reasons for judgment of the majority in the Quebec Court of Appeal ... to the rights or powers of the school commissioners or trustees themselves in considering the rights of a class of persons under s 93(1): see Ottawa Separate Schools Trustees v. City of Ottawa (1916), 32 DLR, p. 10 at pp. 12-13, [1917] AC, p. 76 at pp. 80-81, 86 LJPC, p. 73.<sup>32</sup>

In our opinion, this analysis is the more cogent, in that it transforms theoretical constitutional rights into concrete application. If there is a right of management in section 23 of the Charter, we will have to determine what the substance of that right is, and an analogy with section 93 would be invaluable. Whether the right conferred by paragraph 23(3)(b) is individual or collective, it will have to be implemented through structures with **powers**, powers which will by reference be protected by the Charter, so that there will be a limit on the legislature's room to manoeuvre.

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30. To be published.

31. Study, pp. 132-133; quoted in the judgment in translation, p. 665.

32. Id., pp. 669-670.

Unfortunately, that was not the opinion of the majority on the Supreme Court. In the present state of the law, the Constitution guarantees rights to persons and not to administrators; we must determine whether legislation contravenes the provisions of the Constitution by examining their effect on individuals. This analysis provides greater latitude to the provincial legislatures in organizing the provincial school structures, and so we find that we have not come very far from the position of the Privy Council on this question. So long as the legislature protects a separate form of management from denominational schools, where such management was provided in legislation that predated 1867, it may alter the provincial school system as it pleases. If this is the attitude that is to prevail in applying section 23, the courts will accept the most minimal management rights imaginable in the name of protecting the provinces' exclusive power to legislate with respect to education.

The answer to the question of the practical inefficacy of a referendum was also based on the judges' perception of the nature of 93. In the opinion of the majority, the Superior Court's decision should stand: the inconveniences of a referendum do not deprive the school boards of their right to tax; they affect the right, but not prejudicially.<sup>33</sup>

Le Dain, J., on the other hand, accepted the evidence of the school boards: the cost of a referendum could exceed the amount of money to be raised. Le Dain, J. gave short shrift to the distinction between individual and collective rights:

I would also agree that the rights contemplated by s. 93(1) of the Constitution Act, 1867, may be characterized as "collective rights" ... although such characterization does not necessarily by itself yield obvious answers to the issues that arise under this provision of the Constitution. What the characterization does suggest, however, is that it is the interests of the class of persons or community as a whole in denominational education that is to be looked at and not the interests of the individual ratepayer.<sup>34</sup>

The judge then concluded that because of the cost and uncertainty of outcome of a referendum it "is prejudicial to the effective management of denominational schools in the interests of the class as a whole," since the financial responsibility of the trustees is undermined and the system puts beyond their control the necessary power of taxation. He concludes as follows: "What is in issue here is not the theoretical scope of the democratic rights of a class of persons, viewed in the abstract, but the effective power of

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33. Id., p. 666.

34. Id., p. 670.

school commissioners and trustees to provide for and manage denominational schools in the interests of the class".<sup>35</sup> We are in entire agreement with this point of view, and we believe that it should be applied to section 23.

The third objection to the referendum procedure related to the list of eligible voters. To start with, a correct analysis of Bill 57 indicates that only dissentients would be authorized to vote in a referendum ordered by their trustees; and so denominational rights would be protected. The only real problem arises in Montreal, where the Island school board is the only budgetary authority. Since there is no electoral list, any expense of any school board on the Island that must go to a referendum would be voted on by all the electors, and a request by one school board could be rejected by people who are not subject to that board's jurisdiction. This situation would be contrary to section 93.

In conclusion, the court refused to rule on the thorny question of the territory of Montreal and Quebec City before 1867 and the limitation of section 93 to elementary schools. The court preferred to leave this question to the legislature for the time being, but did hold that the entire system that had been challenged was void because the parts were not severable. As a result, because there was no provision for proportionate distribution of grants and because there was inadequate definition of who could vote in a referendum, the entire reform of school financing in Quebec must fall.

We can draw some useful conclusions from this judgment. First, the rights under section 93 are by nature collective, and belong to individual citizens rather than to administrators. Secondly, the measures taken to restrict the taxing powers of the denominational school boards and make those powers subject to referendum do not violate section 93. (By analogy, extension of funding for separate schools in Ontario would not violate section 93.) These provisions are a valid exercise of provincial legislative powers.

Thirdly, grants must be distributed among the systems on an objective, fair and proportionate basis. Fourthly, section 93 protects the systems in Montreal and Quebec City and the dissentient systems, but to return to the boundaries of the CECM and the CECQ as they existed in 1867 and restrict their jurisdiction to elementary schools, as Bill 3 proposes to do, would make the institutions in question too small to be viable. In any event, this question may have to be settled in a future case.

To take away the denominational nature of the schools in the rest of the province could result in greater use of the right of dissent, so that the system would grow to resemble the Ontario situation: public and separate school boards, with French-language

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35. Id., p. 670.



and English-language schools in each system. The objective of Bill 3, to organize school boards along language lines, would go against this process and would be open to further challenges.

The decision in Greater Hull School Board does not close this debate, but indicates the approach of the Supreme Court to denominational questions and again clarifies the provisions of section 93 of the BNA Act.

The debate over the precise scope of section 93 is therefore not over. The Supreme Court has never said whether this provision entrenches language rights. We can draw the following conclusions from the decisions that have been discussed to this point on the question of protection for denominational schools:

- the school boards of Montreal and Quebec City are denominational by law, as are their schools; the territory covered by this guarantee includes the present and future boundaries of the cities (this interpretation would undoubtedly be disputed by the Quebec minister of justice). The City of Montreal, for example, could annex Pointe-Claire, Kirkland, Saint-Laurent or Outremont; the schools in these territories would then become Catholic or Protestant by law, if we adopt this interpretation. The court did not explain how this change would take place;
- there are six dissentient school boards, three of each denomination. Deschênes, J. believed that only these boards could claim the protection of 93, while Malouf, J. of the Court of Appeal of Quebec believed that 93 entrenches not only the right to denominational status held in 1867 but also the right to dissent, which could still be exercised today.

The rights of denominational school boards in Quebec do not include the right to choose the language of instruction in schools within their jurisdiction. Such rights might, however, include:

- schools of a religious nature and an educational project with a strong denominational nature;
- control by religious authorities over books and courses of a religious nature, and the right to visit schools;
- the right to hire and dismiss teachers for religious reasons (which would run counter to paragraph 2(a) of the Charter: freedom of conscience and of religion - and to union guarantees);



- the right to manage the schools, including the right to raise all necessary funds for such management by unlimited school taxation. Moreover, they have a right to have grants distributed pro rata based on enrolment and to exemption from paying taxes for public schools, except with respect to the grants that are raised by the basic tax;
- the right to adequate funding, which is required in order to manage the schools. This dictum in reference to section 93 could have an influence on the meaning of "public funds" in 23.

### 3. Present legal situation

The history of the legislation respecting admission to English-language schools in Quebec is relatively short. Before the ministry of education in 1964, the government had only minimal influence on education, which was the responsibility of the clergy of the two denominations. In 1968, the first legislation in the field was presented: Bill 85, which had to be withdrawn a few months later in the face of almost unanimous opposition provoked by its retention of freedom of choice; nationalists found it too timid, and the minorities found it too harsh. A year later, the late Jean-Guy Cardinal presented the famous Bill 63, which reiterated the guarantee of freedom of choice but required that English-speaking pupils have a practical knowledge of French. Again, it met with a chorus of protest, and was enacted but replaced by the first official languages legislation in Quebec - Bill 22. It will be recalled that this Act proclaimed that French was the official language of Quebec. Bill 22 made few changes to the system instituted by Bill 63: freedom of choice with conditions relating to the requirement that a pupil have adequate knowledge of the primary language of instruction, whence arose the famous language ability tests, which were difficult to administer. Without an adequate knowledge of English, a pupil was required to remain in the French-language system. The Act also preserved the requirement that English-speaking pupils have a practical knowledge of French.

Again, public reaction was intense. Nationalists attacked it for maintaining the status quo; the English-speaking minority vigorously opposed what it considered to be a serious infringement of its absolute freedom of choice.

Bill 101 turned the province sharply onto a course that undoubtedly left a number of English-speaking Quebecers worrying. Rather than retain qualified freedom of choice, the Bill provided that French would be the language of instruction for everyone except those exempted by it.

The exemptions applied to children:

- of people who had received elementary education in English in Quebec;
- of people domiciled in Quebec who received elementary education in English outside Quebec;
- who were studying in English in Quebec before Bill 101 came into effect;
- who had brothers or sisters as described above;
- whose parents were residing temporarily in Quebec, according to procedures set out in the regulations;
- whose parents came from a province where in the opinion of the minister the rights of French-speaking persons are comparable to those of English-speaking persons in Quebec.

This legislation was challenged in the Supreme Court of Canada, and alleged to be incompatible with the Charter.

- (a) Analysis of the judgment of the Supreme Court in Quebec. Association of Protestant School Boards et al. v. Attorney-General of Quebec et al., (Bill 101 case)

The decision of the Supreme Court was eagerly awaited, and when it came it provided clarification of the right of access to English-language schools in Quebec, and found that the Charter prevailed over Bill 101.

While the judgment is now law, it did not come up to the hopes of the legal community, which was seeking clarification of a number of doubtful points involving the famous first section of the Charter.

In order to understand this judgment, however, we must first look at the earlier decisions of the Superior Court and Court of Appeal of Quebec in the case, since the Supreme Court referred to these decisions.

#### 1. Summary of earlier judgments

As usual, Chief Justice Deschênes (as he then was) had produced an authoritative opinion in the Superior Court. The relevant points may be summarized as follows:

- the Charter does not have retroactive effect to change legislation enacted prior to when it took effect; however, it does apply to such legislation;
- there is no clear incompatibility between section 23 of the Charter and section 73 of Bill 101;
- does section 1 of the Charter apply to 23? Yes, because there is nothing in the wording to limit its effects;

- it does not apply if the rights are denied or taken away; a denial is not a restriction. Section 1 permits the province to restrict rights but not to take them away completely;
- despite this, the court considered the effects of section 1: it confers broader jurisdiction on courts to determine whether a statute is reasonable;
- the reasonableness of a statute may be determined, first, by considering the legitimacy of its objectives, and then by considering whether the means are proportionate to the objectives. In both cases, the burden of proof is on the government;
- here, the objective is legitimate and justifiable: to deny access to English-language schools to French-speaking people and English-speaking people from outside Quebec;
- in the latter case, the means are disproportionate to the objective, because Quebec did not prove that the statute had demonstrably contributed to a decrease in the English-speaking population of Quebec.

All of the judges on the Court of Appeal agreed that section 1 applied to section 23. Monet and McCarthy, J.J. based their ultimate opinion on the fact that section 1 permitted restrictions on rights, while Bill 101 denied these rights entirely. Beauregard, J. held that a denial of a right may be considered to be a restriction, but he qualified this opinion by stating that section 23 was "so precise and it guarantees a right so specific to such a limited number of beneficiaries" that the whole of Chapter VII of the Act, "regardless of its legitimacy, could [not] be considered otherwise than as a prohibited derogation from this right". A few comments come to mind on reading this passage. Far from adopting a liberal and generous interpretation favoring minorities, as did Deschênes, J. here, or the Court of Appeal of Ontario in the ACFO case, Beauregard, J. was firm in his description of section 23 as precise and limited. How can we argue that a precise and limited specific right can help francophones outside Quebec who need a broad right that can grow and adapt to regional variations? Certainly 23 could have been drafted in still broader terms, but we can read it with a generous, not a literal spirit. To characterize it rigidly as specific involves a risk of it being interpreted in the long term in a manner unfavorable to minorities. Secondly, if a legitimate denial can be a restriction covered by section 1, as Beauregard, J. stated, how can he say that the specific character of 23 transforms a legitimate denial in Bill 101 into a prohibited restriction? Why does the precision of the words of 23 mean that Chapter VIII of Bill 101 is prohibited? Is there a causal relationship between the precision of a constitutional right and the prohibition in the statute? What is this relationship? Section 15 of the Charter is specific; sections 8 to 14, and particularly 11, are precise; nonetheless, statutes that

clearly denied these rights have been upheld, because the legitimate denial fell within 1. We might think of the debate over breathalizers and subsection 10(b) of the Charter guaranteeing the right to counsel; the preventive detention of dangerous criminals and sections 11(d) (presumption of innocence), 9 (arbitrary detention) and 12 (cruel and unusual punishment). Beauregard, J. has with this reasoning changed the interpretation of the way in which rights may be abrogated under section 1 of the Charter.

Given the various problems we have noted here, the Supreme Court focused on the distinction between denial and limitation alone, and avoided the discussion of collective versus individual rights, the nature of the reasonableness test, the legitimacy of the objectives and the proportionality of the means. It was impossible not to be disappointed. Rather than provide the long awaited discussion of these questions, the court conjured them away by saying they were not necessary to the settlement of the dispute. We are left with only one clear result: a complete denial of a precise constitutional right would not be permitted under section 1.

## 2. Major points in the judgment

The court's reasoning centered on two main points: first, section 23 was drafted in response to Bill 101, which can only place limits on section 23; secondly, section 73 amounts to an unlawful constitutional amendment, an alteration of the rights guaranteed by section 23, even though it preceded the constitutional guarantee.

Before we examine this argument in detail, we can outline it as follows:

### On the first point

- section 23 does not entrench classical fundamental rights; it is unique in the world;
- section 23 was adopted with full knowledge of the existence and history of legal provisions for language of instruction;
- section 23 was therefore clearly inspired by Chapter VIII of Bill 101; a parallel examination of these two texts proves that the criteria are identical, while the content is incompatible. Bill 101 is the only one of the two to apply such detail to the criteria set out in section 23; it is the archetype system that section 23 set out to reform, the prototype of the mischief to be corrected;
- despite its generosity, Quebec is the only province where minority education rights were regressing, while in the other provinces there was a tendency to strengthen minority rights;



- section 59, which excludes 23(1)(a) from operation in Quebec, reinforced this interpretation;
- this does not mean that 1 does not apply to 23; assuming that it applies, the limitations contained in the Bill cannot be valid, because they are exactly the limitations that 23 was designed to prevent.

On the second point

- section 1 cannot operate as a derogation to section 33. Moreover, section 23 is excluded from the operation of 33;
- section 1 cannot operate to permit a constitutional amendment;
- section 73 of Bill 101 infringes on section 23. The specific classifications in 23 are the heart of that section, since they identify those entitled to claim the right;
- a legislature cannot change these classifications, let alone rewrite them or redesign the categories;
- the fact that section 73 was enacted before the Charter, and that the legislature did not intend to contravene the constitutional provision which did not then exist, has no effect on its validity; intention has nothing to do with this, and the question is only the effect of the provisions in question.

On the two other questions

- the appellants were Protestant institutions which wanted to know whether they would be legally obliged to admit "Canada clause" children to their institutions, and if so whether they would be entitled by law to receive the appropriate grants;
- the Attorney-General of Quebec admitted that the answer to these questions should be yes, and the Superior Court accepted this admission; the Court of Appeal did not refer to it;
- since counsel had not make submissions in response to these questions, the trial judgment based on the admission by the Attorney General of Quebec remains valid.

3. First argument: section 23 is a response to Bill 101

Various arguments were made in support of this opinion. While the court refrained from saying that section 23 would apply only in Quebec, several pages of the judgment were devoted to the analogy the court drew between the constitutional provision and its Quebec counterpart. Will this analogy have any impact on the other provinces?

It may have a positive impact on francophones outside Quebec. The court used Bill 101 only as a pretext to grant the same general rights to all Canadian minorities. The rights set out in 23 are uniform; in response to Bill 101, they were intended to restore rights to English-speaking Quebecers as well as to give the same rights to francophones outside Quebec. Thus we have a giant step for the latter group, since all official language minorities in the country will be legally and actually on an equal footing. Moreover, any precise constitutional right cannot be easily affected by any other legislation; any infringement of such a right must be only slight and of limited effect.

The court itself provided some indications that permit us to hope that this favorable approach to minorities will draw the attention of Canadian courts as it has the political commentators. The court included in its judgment a number of dicta concerning the general effects of 23, despite the fact that it is a specific provision. For example:

... Rightly or wrongly - and it is not for the courts to decide - the framers of the Constitution manifestly regarded as inadequate some - and perhaps all - of the regimes in force at the time the Charter was enacted, and their intention was to remedy the perceived defects of these regimes by uniform corrective measures, namely, those contained in s. 23 of the Charter, which were at the same time given the status of a constitutional guarantee. The framers of the Constitution unquestionably intended by s. 23 to establish a general regime for the language of instruction, not a special regime for Quebec; but in view of the period when the Charter was enacted, and especially in light of the wording of s. 23 of the Charter as compared with that of ss. 72 and 73 of Bill 101, it is apparent that the combined effect of the latter two sections seemed to the framers like an archetype of the regimes needing reform, or which at least had to be affected, and the remedy prescribed for all Canada by s. 23 of the Charter was in large part a response to these sections.<sup>36</sup>

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36. Id., pp. 331-332.

The court added:

By incorporating into the structure of s. 23 of the Charter the unique set of criteria in s. 73 of Bill 101, the framers of the Constitution identified the type of regime they wished to correct and on which they would base the remedy prescribed. The framers' objective appears simple, and may readily be inferred from the concrete method used by them: to adopt a general rule guaranteeing the francophone and anglophone minorities in Canada an important part of the rights which the anglophone minority in Quebec had enjoyed with respect to the language of instruction before Bill 101 was adopted.<sup>37</sup>

These passages are worthy of particular attention. They indicate in effect that section 23 was designed as a remedy for a situation that was considered to be in need of correction: it was remedial legislation. Here, it was the rights of anglophones to have access to English-language schools; in Ontario, it was the rights of francophones to manage their schools (the ACFO case). This remedy is also described as "uniform," "a general regime," "a remedy prescribed for all Canada," a "general rule." The emphasis appears to be on the fact that section 23 is uniform and national in scope, and of general application.

We should not conclude that the court believed that section 23 will have the same effect everywhere; the court is careful to state that while the regime is general it may be applied in different ways. The right of access set out in 23 applies throughout Canada. Subsections (1) and (2) set out very rigid criteria, while subsection (3) introduces an element of flexibility into the system. However, these passages do indicate that the court views section 23 as a tool for minority-language groups to use in seeking equality. English-speaking Quebecers will have their rights restored, while francophones outside Quebec will have greater rights given to them. It remains to be seen whether this similarity of rights includes the substance of the rights, or only the manner of determining who is entitled to them. In the first case, the judgment would have far-reaching effects; in the second, it would have almost no effect, since it is already obvious that the criteria contained in 23(1) and (2) apply uniformly throughout Canada.

We set out supra the reasons why the court found that section 23 was a response to Chapter VIII of Bill 101. The court would not put forward such an opinion unless it was carefully reasoned. However, the reasons advanced leave the reader still confused and unsatisfied. The judgment is disappointing on first reading, and closer study does not succeed in ridding us of the impression that the arguments used suffer from being built on weak foundations, undeniably logical though they may be.

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37. Id., pp. 335.



The first part of the judgment opens with an analysis of 23 that is quite different from the view taken by the Court of Appeal of Ontario in the ACFO case.<sup>38</sup> While the Court of Appeal took the position that the Charter entrenched bilingualism and the dual nature of Canadian society, the Supreme Court took a slightly different approach to the effects of section 23. This passage should be considered in context: the court considered it to be a Canadian response to a Canadian problem. The court stated:

Section 23 of the Charter is not, like other provisions in that constitutional document, of the kind generally found in such charters and declarations of human rights. It is not a codification of essential, pre-existing and more or less universal rights that are being confirmed and perhaps clarified, extended or amended, and which, most importantly, are being given a new primacy and inviolability by their entrenchment in the supreme law of the land. The special provisions of s. 23 of the Charter make it a unique set of constitutional provisions, quite peculiar to Canada.

This statement characterizes section 23 as an isolated, specific, unique right, different from other entrenched rights both in this Constitution and in other fundamental rights documents. The court appears to want to treat section 23 as a distinct right. While the provisions of 23 do not in any way resemble a declaration of fundamental rights, it does, as we discussed in the introduction, represent the Canadian response to the language of instruction problem, which each country deals with in the context of its own national spirit.<sup>39</sup> We should not conclude from this passage of the judgment that section 23 of the Charter will be interpreted more restrictively than other guarantees of fundamental rights. In our opinion, this reference invites us to study the Canadian minority education rights situation in seeking to define the substance of the right.

The court went on to consider the law in place at the time that the framers of the Constitution had in mind in adopting section 23. This reference brings to mind the frozen law concept put forward by some judges in the decisions under the Canadian Bill of Rights: Parliament knew the law, and cannot be taken to have intended to change it by legislation as general as the Bill of Rights. In this case, the reverse is argued: the framers knew the education regimes in effect under provincial law, and therefore adopted this provision to counter the existing law. To demonstrate this, the court traced the development of education rights in Quebec, and concluded:

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38. Re Minority Language Education Rights (1984), 10 DLR (4th), p. 651

39. In Switzerland and Belgium, for example, a territorial approach has been taken.



Although the fate reserved to the English language as a language of instruction had generally been more advantageous in Quebec than the fate reserved to the French language in the other provinces, Quebec seems nevertheless to have been the only province where there was then this tendency to limit the benefits conferred on the language of the minority.

The court added that in other provinces, either the legal situation had remained unchanged (N.B., Newfoundland) or statutes had been adopted "improving the situation of the linguistic minority."<sup>40</sup>

This statement should be qualified. Certainly recent legislation respecting the education rights of francophones outside Quebec has tended toward an extension of those rights. These statutes now recognize a social phenomenon they earlier ignored: the persistence of French-language instruction. But we should not forget that most of this legislation still contains problems which we have considered for each province. The opinion of the Supreme Court should not be seen as implicit ratification of new school legislation, but should be considered in the context of the development of education rights and the need for further improvement.

The most relevant passage of this part of the judgment compares the provisions of the two sections in question, section 23 of the Charter and section 73 of Bill 101. The court found similarities between them. It noted that Bill 101 is the only one to set out such precise provisions and to be so similar to the Charter, and in the same breath stated that school legislation in the Maritimes also refers to the mother tongue, or the numbers warrant test. These statutes also contain the same concepts, as does the Ontario Act, which the court does not quote. All provincial statutes that contain provisions on the language of instruction make reference, in various ways, to the same concepts as we find in section 23 of the Charter. The framers of the Constitution thus had more in mind than Bill 101, if they were actually thinking of models. The court then made its statement, quoted supra, that the framers had got two birds with one stone: on the basis of Bill 101, they imposed a uniform educational regime throughout the country. In order to avoid other Bill 101s, they created section 23. If that was their goal, we believe that section 23's effect on school legislation in other provinces may be limited. In our opinion, section 23 does more than respond to Bill 101, and should be read in this wider context.

However, having thus agreed that 23 was intended to remedy the effects of Bill 101, the court came to the quite logical conclusion that section 73 of Bill 101 cannot be seen by the framers as a reasonable limit as provided in section 1. Since this part of Bill 101 was what was intended to be erased, it cannot be a reasonable limit. This is nice reasoning, but it is based on a questionable

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40. Op. cit., p. 333.

premise. If all constitutional provisions were included in the Charter in order to remedy situations that the framers of the Constitution considered to be unacceptable, what about statutes that were enacted after the Charter was adopted? What about statutes not directly covered by 23? (We might think here of immersion classes, the structure of school management, the various problems not related to Bill 101.) If a prior statute that was "corrected" by a constitutional provision cannot be considered to be a reasonable limit, could a subsequent statute, cleverly drafted so as to obviate the constitutional guarantee without directly contravening it, be considered to be a reasonable limit?

Reasoning based on the remedial concept of 23 can lead to desirable results, but the court must clarify its approach to section 1. The day after the judgment was rendered it was said that any statute that violated a precise right would be invalidated. This conclusion should be qualified. A cleverly drafted statute could not be entirely in compliance with the provisions of 23 and pass the test in section 1. Future applicants will nevertheless have to understand from this judgment that no infringement of 23 will be tolerated by the Supreme Court. When there has not been as clear a violation as here, however, we must expect there to be qualifications in the court's opinions.

To summarize, this part of the judgment indicates that:

- section 23 is not a truly fundamental right in the classical sense. It is precise and is unique to Canada;
- section 23 was designed to remedy Bill 101;
- Quebec is the only province in which minority language rights are regressing;
- when the framers of the Constitution remedy a legislative problem the legislation in question cannot be a reasonable limit.

We have drawn the reader's attention to the following consequences:

- the unique quality of 23 can damage as well as strengthen it. If it is to be interpreted in isolation from the other rights in the Charter, the results will be unfavorable. The present tendency of the courts is to take a favorable approach, and integrate the Constitutional provisions so as to interpret them jointly;
- the court's historical view does not take into account the real situation of francophones outside Quebec. We hope that it will modify this approach if presented with more concrete argument and evidence;

- the fact that 23 remedies Bill 101 and imposes a uniform regime throughout Canada will make it difficult to apply it to legislation other than Bill 101, drafted in different terms and not covered by 23. Section 23 will then have to be adapted to new situations;
  - as a result, if a direct constitutional response to a statute, such as section 23 of the Charter, makes that statute inoperative, a statute indirectly covered by 23 could itself be seen as a reasonable limit.
4. Second argument: section 73 of Bill 101 is an illegal amendment to the Constitution

The court's second argument was given in the alternative and is thus obiter, but appears to us to be the more convincing of the two. Legally, it is closer to the more traditional analysis of the law, and so is more familiar to the legal community. This argument is based on two absolutely fundamental premises, which are invaluable in determining the impact of the Charter: a statute that affects a right covered by the Constitution cannot use the cover of section 1 to effect what amounts to a complete denial of the right, as it could under section 33, or to a unilateral amendment of the Constitution. The court would have had sufficient ground, based on these two premises, to undertake a political evaluation of 23.

First, section 33 authorizes Parliament or a provincial legislature to declare expressly that a statute will operate notwithstanding the rights guaranteed by the Charter. This notwithstanding clause generated great outcry among the defenders of human rights in Canada, as being the very antithesis of a properly drafted Charter of Rights. There was also concern about the interaction of limits accepted by the courts under section 1 and limits imposed by governments under section 33. This time, the court has provided us with clearer answers. The court first noted that the effect of section 73 of Bill 101 was to abrogate the rights contained in section 23 of the Charter. There are three ways of abrogating the rights in the Constitution: by a reasonable limit, by express exception under 33, and by a constitutional amendment using the amending formula. Section 33 cannot apply: the notwithstanding clause covers certain rights that do not include education rights. Constitutional amendment also does not enter into this discussion, because the amending formula was not used. This leaves us with section 1. Since the framers of the Constitution considered it advisable to provide for three distinct methods of amending rights, they provided for the three methods to be different. We cannot therefore use section 1 to effect a complete abrogation amounting to a legislative amendment as authorized by section 33, or amend the Constitution without following the amending procedure set out in section 38 et seq. Bill 101 directly abrogates section 23. Since



Quebec cannot rely on 33, it must have amended the Constitution. Bill 101 also cannot be justified under section 1; the court stated: "Such limits cannot be exceptions to the rights and freedoms guaranteed by the Charter nor amount to amendments of the Charter."<sup>41</sup> If therefore appears that the Court has placed considerable restrictions on the scope of section 1. If the legislation in question denies a right, it violates the Charter and is not covered by section 1. This approach is a reiteration of the denial/limitation dichotomy Deschênes, J. described in the Superior Court. A right is not limited if it is denied completely. Is it limited if it is denied in part? That remains to be seen. The difference between denial and limitation is subtle; the difference between complete denial and partial denial is certainly no clearer. But while we must see in this a general approach by the courts rather than specific reasoning, we would note that the approach taken appears to us to be liberal, and is promising for the official language minorities in the country. If, for example, a court finds that French immersion is not the same as French-language instruction, provinces like Alberta which merge the two programs will be found to be violating 23; this situation will be outside section 1 and therefore unconstitutional. We would hesitate, however, to extend this reasoning to measures that are not enacted as legislation, since the sections of the Charter in question refer to "law." Guidelines and decisions come rather under 24. However, a statute or regulation that contravenes section 23 could be challenged by seeking a declaration that it is invalid.

This second part of the judgment is shorter than the first, and appears to us to be more directly meaningful to consideration of the future interpretation of 23. The court stated:

The rights stated in s. 23 of the Charter are guaranteed to very specific classes of persons. This specific classification lies at the very heart of the provision, since it is the means chosen by the framers to identify those entitled to the rights they intended to guarantee. In our opinion, a legislature cannot by an ordinary statute validly set aside the means so chosen by the framers and affect this classification. Still less can it remake the classification and redefine the classes.

It is clear that the statute is incompatible with the Charter. The court had no difficulty in finding that Quebec had attempted to amend the Constitution illegally. The legal community should therefore direct its efforts to this notion of contradiction and incompatibility. If we can convince a court that legislative provisions dealing with numbers, teaching establishments, public funds, bilingual schools, limited access, quality of services or freedom of choice were incompatible with section 23 of the Charter, we would be able to avoid the entire debate over the nature of a reasonable limit. The ACFO case illustrated this approach clearly,

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41. Id., p. 337.



and in fact went further, stating that the silence of the legislature can make legislation incompatible with 23, just as a provision that directly abrogates such rights would do. Thus a court need only interpret 23 and find a contradiction between that section and the statute in question, for the statute to be found invalid. We should note that this analysis is contrary to the presumption of constitutionality and ignores the accepted techniques of interpretation. We should not forget the two precepts that have been firmly rooted in our constitutional law: a statute is presumed to be constitutional, and Parliament is deemed to have intended to respect the supreme law of the country; if there is ambiguity in interpretation, we must choose the version that is most likely to result in a finding of constitutionality. We know that the latter proposition was criticized by the Court of Appeal of Ontario (in the ACFO case), which based its opinion on the fact that the guarantee was entrenched and was a remedial provision, and chose an interpretation that followed the intent of the framers of the Constitution - liberal, even bold, in spite of the fact that interpretation resulted in a finding that the legislation was unconstitutional. The first proposition does not seem to have carried much weight with the Supreme Court. Cases under the Charter to date seem to be clear and consistent: first, an applicant must demonstrate that the statute challenged is prima facie unconstitutional; the government then has the burden of demonstrating that section 1 applies. If the incompatibility of the statute with the Charter removes the right guaranteed in the Charter, the government will no longer be able to shelter under section 1.

Thus we can learn from the second part of the judgment that:

- section 1 cannot be used to effect an express exception governed by section 33 or a constitutional amendment not effected by the amending procedure;
- an abrogation of a right will be found when the statute contradicts an essential element of the Charter;
- a total denial of a right is not a limitation;
- subsequent challenges will have to show clearly that there is a contradiction between the statute and the Charter if section 1 is not to be applied.

Apart from the points we referred to supra, there is not a great deal in this decision to assist us. The situation considered was peculiar to Quebec, and the problem was solved in a manner that will affect that province alone. Thus we should not attach too much importance to the unique aspects of the decision, the restrictive approach taken and the little time devoted to interpreting the Charter. While there are some positive aspects, they relate to the

statements concerning the uniform application of section 23. Violation of a specific entrenched right cannot be justified under section 1, because such a violation amounts to an exception that cannot be effected under 33 or an illegal constitutional amendment. A complete denial of a right can never amount to a limitation. Section 23 imposes a model on all of Canada inspired by Bill 101 but was designed to correct the major defects in that statute. We believe that the manner in which the Supreme Court described section 23 at the beginning of the judgment, that it is not a true fundamental right but a unique provision, should be treated with caution and viewed in such a way as to permit its use in support of a liberal interpretation of minority-language education rights. Its uniqueness means that 23 can take on an energy that we do not find in other fundamental rights. While this argument is attractive, we see in it only one approach to interpretation. The position of the court appears ambiguous: on the one hand, it seems to have held back so as not to go too far in analyzing section 23, confining its remarks cautiously to the case of Quebec; on the other hand, it implies that education rights cannot be restricted lightly, and must be taken seriously. There will have to be more challenges before we get a clearer idea of the position of the court.

##### 5. The situation since the judgment

With respect to admission to schools, Chapter VIII of the Charter of the French Language and the regulations under that chapter were declared by the Supreme Court to be inoperative in so far as it contravened section 23 of the Canadian Charter of Rights and Freedoms. The total invalidation of Chapter VIII destroyed the structure of the legislation, and replaced it with the section 23 mechanism alone, which does not cover French-speaking Quebecers (except in 23(2), which confers a right, not an obligation) or parents whose mother tongue is English who are excluded by section 59 of the Constitution Act. Is Quebec still required to enact legislation if it wants to force French-speaking children to go to French-language schools? Neither the judgment of the Supreme Court nor section 23 of the Canadian Charter of Rights and Freedoms takes away the power to do so, which is within the almost unlimited provincial jurisdiction over education contained in section 93 of the BNA Act. Quebec could also enact legislation respecting the language ability of English-speaking children wishing to attend French-language schools. Section 72 of Bill 101 will probably remain in effect for francophones to whom 23 does not apply.

The only argument to be made against this interpretation is that 93(1) gives denominational school systems the absolute discretion to decide whom to admit to their schools. This argument loses some of its force, however, when we consider the decisions in Mackell, Barrett, Hirsch, Tiny, and PSBGM; it appears clear from these cases that provincial jurisdiction over education permits the legislature

to alter the school structures, to determine the language of instruction and to affect the rights of denominational institutions so long as it does not do so prejudicially.

To what extent are private schools covered by the Act? Section 72 of Bill 101 applied to private schools that received grants; section 1 of the Education Act includes private schools within the scope of the Act. These schools are subject to government control respecting instruction and teaching. They are given more freedom with respect to management. We believe, however, that funded private schools fall within the category of facilities provided out of public funds referred to in 23(3) of the Charter and would therefore have to comply with the Charter.

In addition, the reciprocity clause in section 86 of Bill 101 has no more purpose in the situations described in 23(1)(b) and (2) of the Charter, since such reciprocity is imposed by the Constitution: any person who has received primary or secondary education anywhere in Canada or who has children who received or are receiving instruction in English in Canada has a right to have his or her children receive instruction in English in Quebec.

Quebec could perhaps enact legislation to specify what it means by "instruction in English" and to limit this expression by excluding immersion. Similarly, in an article published in Le Devoir on August 3, 1984, the Honorable Claude Ryan (Liberal education critic) proposed that Quebec limit access to English-language schools to Canadian citizens residing in Quebec. The temporary residence clause<sup>42</sup> would not apply to non-citizens and people who had resided in the province for less than 12 months, for example. All these provisions, and others of this sort (such as adequate knowledge of the primary language of instruction) could be considered as being not denials of rights but reasonable limits.

#### 4. Administrative and related matters

With respect to the central structures, section 7 of the Act respecting the Ministère de l'éducation<sup>43</sup> authorizes the government to appoint two associate deputy ministers on the recommendation of each of the denominational committees of the Conseil supérieur de l'éducation; subsection 8(2) of the Act provides that "each deputy minister shall be responsible for the guidance and general direction of the schools recognized as Catholic or Protestant, as the case may be."

As in Ontario, the school board is the cornerstone of the system established by the Quebec Education Act. School boards in Quebec, however, are subject to closer control by the ministry of education, and the Quebec system is customarily regarded as being more centralized than its Ontario counterpart.

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42. Bill 101, s. 85.

43. RSQ, 1977, c. M-15.



The powers of the government over education are set out in section 16; they include:

- (1) the organization, administration and discipline of schools;
- (7) the establishment of the pedagogical system in the schools placed under the control of school commissioners.

The minister shall approve books and materials, and shall conduct investigations, establish budgetary rules respecting funding, and hear complaints against teachers.<sup>44</sup> Various other sections impose general responsibility for the system on the Minister; for example, section 2 of the Act respecting the Ministère de l'éducation states:

The minister shall be responsible for promoting education and assisting the young in the preparation and planning of their future, and for ensuring the progress of educational institutions.

The Act describes school boards as "school corporations,"<sup>45</sup> which have jurisdiction over a "school municipality," defined in subsection 1(2) as "any territory erected into a municipality for the carrying on of schools under the control of school commissioners or trustees."

Since the reform of the school system is designed to redistribute territory, we should examine the present procedure. Keep in mind that only eight school boards have guarantees of their denominational character; one of our questions has been whether the territory under the jurisdiction of these eight boards is frozen. This is a significant question, particularly in Montreal, and we have already raised it here.

The general rule for territorial changes is contained in section 36, which provides for two situations:

- the government may organize territories that are not organized as a school municipality or may annex them to organized territories, either on the recommendation of the minister or on the recommendation of a sufficient number of real estate owners;
- the government may also unite, annex, alter or divide territories, on the recommendation of the minister, on the request of a majority of electors or at the request of the school board.

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44. Cf., ss. 17, 15, 15.4 and 18 of the Education Act.

45. S. 73 of the Education Act.



Sections 38 and 39 provide for the procedure for establishing a denominational board. The government may divide a territory into two distinct school municipalities, for Catholics and Protestants (38(2)); this change of territory will affect only the Catholics or Protestants in the territory (39). In this case, a non-Catholic or non-Protestant must choose the system to which he or she will pay taxes and send his or her children.

Finally, subsection 49(1) guarantees that any change, division or erection of a school municipality will not affect a dissentient minority unless their trustees agree.

Under the new system, the minister will redraw the school map. Since March, 1985 the minister has designated school territories by Order-in-Council. The new school boards to be elected in June, 1985 will have to prepare a list of their schools and decide whether they will be kept open or be closed.

The school boards (and the trustees of dissentient schools) are granted various powers by the Act, most important of which are:

with respect to schools (s. 189):

- (1) engage teachers;
- (3) ensure that courses "are given to all the children domiciled in the territory under their jurisdiction if they wish to enrol in such courses, in conformity with the Charter of the French Language (chapter C-11)";
- (4) ensure that the courses given in their schools comply with the curricula and regulations;
- (5) require that only authorized material be used;
- (6) make regulations for the management of their schools;
- (18) ensure the application of the pedagogical systems and adapt the optional content of curricula;
- (19) ensure that the schools provide educational and cultural services;
- (20) ensure that the schools provide high quality education.

sections 200-212: hire and manage teachers.

with respect to property (s. 213):

- (1) administer property;
- (3) select school sites, build and maintain schools.

with respect to taxes (sections 226-231):

s. 226, levy a tax for all expenses not covered by grants.

The school boards have limited powers over admission. Section 33 requires that they admit all children between 5 and 16 years who are domiciled in the territory; within this general rule they are free to set their own criteria.

The individual schools in Quebec are not insignificant bodies. The Act defines a school as "an institutional entity under the authority of a principal, or of a person in charge if there is no principal, designed to provide education to pupils in an organized manner, in whose activities the pupils, teachers, other members of the staff and parents participate." A school is established by a school board, and the discretion of the board in this matter is limited by government regulation. The principal of a school determines the orientation and activities of the school, takes part in the school board's program development and, more specifically, ensures that there is an educational project, applies the pedagogical system defined by regulation, chooses teaching materials and provides for the internal management of the school.<sup>46</sup>

The principal is assisted by a school committee, which has recently received increased power. It is made up of representatives of the parents for each grade, a principal and a representative of the teachers, who is not entitled to vote.<sup>47</sup>

The school committee is an advisory body. It stimulates the participation of parents in the improvement of educational services, promotes more personal educational services, and must be consulted and give advice on certain matters, some of the most important of which are:

- orientations of the school;
- the educational project;
- application of the pedagogical system;
- choice of textbooks and teaching materials;
- criteria for hiring the principal;
- activities not included in the curricula;

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46. Education Act, ss. 32(1), 32(3) and 32(4).

47. Id., s. 50.

- schools closings;
- the status of a school within the meaning of the regulations of the Catholic committee or the Protestant committee.<sup>48</sup>

In addition, a school may have an orientation committee, which is made up of a principal, three parents from the school committee, two representatives of the teachers, a representative of the non-teaching staff, two pupils of the second cycle of the secondary level if applicable, and one commissioner.<sup>49</sup> This committee is governed by the regulations of the school board, and its functions are:

- to determine the specific orientations of the school;
- to participate in the preparation of the educational project, follow the carrying out of the project and evaluate it;
- promote co-ordination among all the parties;
- regulate the use of school premises in accordance with the regulations;
- make recommendations on the introduction of new curricula.

School funding has also been changed, and as we have seen these changes do not apply fully to denominational schools. For other schools, on the basis of the budgetary rules established by the minister under the authority of section 51.1 of the Act, the school boards are funded by base grants. The Act respecting Grants to School Boards provides for the rates for grants for school maintenance, teachers' salaries (which are higher at the secondary level), textbooks, construction and renovation.

With respect to federal funds, section 13 of the Act respecting the Ministère de l'éducation authorizes the minister to enter into agreements for the purpose of facilitating the "establishment of youth"; section 14 provides that the government may take such steps as are necessary for fulfilling such agreements. Section 16, which dates from 1964, provides:

The subsidies paid by the Government of Canada under agreements made by virtue of section 13 shall not be paid into the consolidated revenue fund of Quebec but shall constitute a special fund.

Any subsidies granted by the government may also be paid into the same fund.

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48. Id., ss. 51 and 51.1.

49. Id., ss. 54(1) and 54(2).

... the fund and the revenue derived therefrom shall, under the same control, be used for the purposes for which the subsidies were granted.<sup>50</sup>

Thus the objective of imputability is met by the last sentence in the section, while the objective of visibility is defeated by the second paragraph.

For all expenses in excess of grants, the school boards are authorized to impose taxes up to 6% of their net expenses, or 25 cents per \$100 of assessment. A referendum must be held if any greater amount is to be raised through taxes.<sup>51</sup>

The right of dissent is fairly closely regulated. Sections 55 to 73 provide for a procedure for giving notice of the exercise of the right which is conferred on "any number of property-owners, tenants or ratepayers professing a religious belief different from that of the majority of the ratepayers of such [school] municipality" (s. 55). This provision entitles the minority to three trustees (s. 58). Section 59 requires that every ratepayer give notice withdrawing from the school board. When two-thirds of the religious minority have given notice, all ratepayers not professing the religion shall be considered to be dissentients. If the dissentients become a majority in the school municipality, section 60 provides that they may organize themselves as a corporation of school commissioners. In that case, the former majority may then declare itself dissentient (s. 61). The dissentients "shall not be liable for any taxes or school taxes imposed by the school commissioners" (s. 62).

There are a number of provisions governing mergers of various dissentient corporations, dissentients scattered in several municipalities, and a single dissentient who wishes to support the separate school in a neighboring district or to cease to be a dissentient. If the trustees do not maintain any schools for a period of a year, the minister may recommend that the government abolish the corporation of trustees (s. 66).

As may be seen, there is nothing said about choosing English-language books and programs, management of schools by anglophones or access to English-language schools. This system is based entirely on the denomination of the school. As well, an entire section of the Act deals with the structures on the Island of Montreal. The school board of the Island of Montreal is made up of representatives of the CECM, the PSBGM, other school boards and the government, and is responsible for funding, developing joint services, imposing taxes, receiving grants and managing school transportation.<sup>52</sup>

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50. RSQ, 1977, c. S-36, ss. 20, 3, 4, 7, 8 and 10.

51. Ss. 226 and 354(1).

52. S. 495 et seq., Education Act.



Other parts of the Act contain similar provisions for those in the general system, and govern Cree, Naskapi and Kativik school boards; there are particular provisions for transportation, residences and the hiring of native people. Religious education and the right to exemption from religious education are guaranteed.

From this information we can draw the following outline of education law in Quebec:

- dissentient schools and school boards, along with the boards in Montreal and Quebec City, are denominational by law. Their legal regime is separate from the other schools and school boards as to funding, the guarantees of religious instruction and a religious atmosphere, and the hiring and firing of teachers. The Protestant system takes in Jews as well as all the various branches of Protestant belief;
- elsewhere, the system is based on denomination and not language. Nonetheless, the correlation of language and religion results in a situation in which the majority in the Protestant structures is English-speaking;
- admission to English-language schools is guaranteed by the Constitution:
  - to English-speaking Protestants,
  - to children of persons who qualify under 23(1)(b) (language of primary instruction in Canada was English) of the Constitution Act, 1982.

For other people, the invalidation of Chapter VIII of the Charter of the French Language seems to have created a legal vacuum. The Quebec legislature would prima facie be entitled to impose a school system. It remains to be seen whether freedom of choice in the language of instruction is part of the denominational rights protected by 93, as a right of the denominational and dissentient school boards to admit anyone to their schools who wishes to attend them;

- the school boards have little initial power. The Act makes them the intermediaries between the school and the minister. Their jurisdiction includes personnel and material management and the local implementation of programs;
- the ministry is responsible for the development of programs and for school inspection;

- the school has a certain role itself, which is defined in the Act. It is managed by a principal, a school board and a parents' committee, which together are responsible for adopting an "educational project" for a school;
- funding for the system is centralized and is effected through grants.

## 5. Proposals for reform

### (a) White paper and Bill 40

On the basis of the white paper entitled "Une école communautaire et responsable" published in 1982, the government tabled in the national assembly an audacious proposal for reform which met with mixed reactions. Since this Bill affects both language and denominational rights, we shall consider it briefly, although it has been withdrawn.

Rather than imposing a duty, section 14 of the Bill confers a right:

Every person five years of age or over has a right to formative and pre-cognitive learning services in pre-school and to instructional services in elementary and secondary school.

Section 18 removes the residence condition and provides for mobility rights:

The parents of a pupil, and pupils of full age, have a right to choose the school best suited to their preferences, or having the educational scheme best suited to their personal values.

As the white paper had provided, the emphasis is on the school. It would be a legal corporation, with ultimate power over educational and pedagogical matters, human resource management and financial and material management.

A school would be established by a board of education (s. 29) which would determine its language status. That is, the school board, and not the Act or the ministry, has the power to determine what language the school will be. If the school board is itself based on language, it could not be permitted to deny the linguistic minority in its territory the right to manage its schools. Provisions affecting school boards will have to be observed closely.

Subsection 133(3) confers on the government the power to determine the language status of the school board when it is constituted by order-in-council. There is nothing said about changes of status; either the government would have discretion in this, or status can only be changed by legislation - and the silence of the legislature would lead us to the second conclusion.

To return to the school and school structures, we would note that a school would be governed by a school council, with supreme authority over the school; the council would be composed of elected parents and representatives of the various components of the school, and would take over the functions of the present committees but with no power of enforcement. A school committee may also be established, made up of a parents' committee, and educational committee and a pupils' committee. These committees must be consulted on a number of matters. Although the Bill does not refer to the linguistic composition of these bodies, we may presume that they would be the same as the language of the school board or school. Otherwise, section 23 could be argued, since the council and committee are management mechanisms in the schools, and management falls within section 23.

The school board would become a co-operative of services, a co-ordinating body rather than a decentralized autonomous body having specific powers. It would still be the employer of teachers in the schools, and would assign them to schools in accordance with the "educational scheme" in each school. It would manage buildings, but the school would decide on the use of buildings. It would provide support for educational organization in the territory, establish admission criteria for pupils, and act as a central admission agency. It would be responsible for school taxes (still under the 6% limit) and for transportation, which it could finance. (Note that under 23(3) funding for transportation might be considered to be mandatory.)

All these provisions did not please the Catholic or Protestant school boards. The Bill embodied a diminished role for denominational school boards, favoring the schools and promoting a tightening of control in the hands of the minister directly over the schools. With respect to language rights, there is little to say, except that the flexibility proposed by the legislature and described supra might result in huge imbroglios. The Quebec legislature would perhaps do better to take its cue from the New Brunswick legislation, and impose complete territorial unilingualism on the school boards, permitting minorities to form minority districts whose territory would take in the territory of the main school board. The system proposed may comply with the Charter by giving the linguistic minority control over its schools, but we should remember that 23 is simply a minimum, and the school system as a whole should also promote greater integration and homogeneity.

With respect to religion, the right to dissent may become a source of even greater tension and confusion.

Section 30 provides that "the school is public and common," but section 31 provides that it "may integrate with its educational scheme the religious beliefs and values of any particular creed," and may also ask the Catholic or Protestant committee established by the Act respecting the Conseil supérieur de l'éducation (RSQ, c. C-60) to recognize the school as Catholic or Protestant.

Section 101 provides that "the school shall offer a choice between Catholic or Protestant religious instruction and moral instruction." Section 102 provides that religious teaching shall be under the authority of the confessional committees. There are therefore degrees of religiosity in the schools:

- the school shall offer religious instruction to those wishing it;
- it may obtain religious status;
- it may also declare that it is dissentient.

Section 330 provides:

Nothing in this chapter must be interpreted so as to prejudice rights and privileges possessed at the time of the coming into force of the Constitution Act of 1867, by classes of persons respecting confessional schools.

Sections 334 and 337 would freeze the territory of existing school boards at the 1867 boundaries, for Montreal and Quebec City, as at the date of dissent for Baie Comeau (Protestant), Greenfield Park (Catholic), Laurentienne (Protestant), Portage-du-fort (Catholic) and Rouyn (Protestant). Section 338 preserves the right of dissent. Thus in Quebec under all elements of this reform we would have the following situation:

- French-language school boards possibly managing:
  - neutral French-language schools,
  - Catholic French-language schools,
  - schools of other French-language religious minorities,
  - neutral English-language schools,
  - Catholic English-language schools,
  - Protestant English-language schools,
  - schools of other English-language religious minorities;an English-language section of the school board could manage the English-language sector.



- English-language school boards managing the same eight kinds of schools:
  - denominational and dissentient school boards now in existence, both Catholic and Protestant, and their French-language and English-language schools;
  - new dissentient school boards - Catholic and Protestant, French-language and English-language - managing their schools;
  - these dissentient school boards would not be governed by the new Act as to the status of the school, the school council, the school board and related bodies. They would remain under the present system, but would be subject to the general linguistic system.

The parties in this debate were emphatic that there would be no damage to the linguistic character of the school boards; the boards would also have to have the necessary powers and appropriate resources for performing their duties, in order to comply with the Constitution. In short, they would have to have the powers conferred on religious dissentients. This reform would take away a part of their powers, relating both to teaching and to taxes. While the protection of section 93 of the BNA Act preserves the province's jurisdiction, we will have to see how the concept of "management" in section 23 of the Charter will be interpreted, and what the limits on that concept in Quebec will be.

(b) Bill 3

Some of the ideas set out supra were incorporated into a statute enacted by the national assembly in December, 1984. This Act made some changes to the proposals contained in Bill 40, and provided details for the implementation of the reforms. Bill 3 adopted the principle of language-based school boards, somewhat like the New Brunswick model. French-language boards will manage French-language schools exclusively, and English-language boards will manage English-language schools exclusively. This division appears to us to be more in conformity with section 23 of the Charter than the present division or the division proposed in Bill 40. The principle set out by the Court of Appeal of Ontario is reflected in both the institutions and the provisions of the Act. The grouping of English-speaking populations in homogeneous school units can only strengthen the quality of the teaching and the community spirit of the minority. The concept of a dual school map makes these groupings possible. For example, in Montreal the French-language school board will gain 8,000 French-speaking Protestant pupils now under the jurisdiction of the Protestant School Board of Greater Montreal - an English-language board a majority of whose pupils are English-speaking. On the other hand, 13,000 English-speaking Catholic pupils now under the jurisdiction of the CECM - a majority of which is French-language - would go to the English-language school

board. For English-speaking Montrealers, the Bill makes possible a consolidation of assets. The language-based school boards will have powers similar to existing school boards; the idea of a service co-operative was abandoned, in favor of a more traditional concept of an intermediary power structure. However, the reform will be used to abolish local school boards now managing only elementary schools, and regional school boards now managing only secondary schools, by integrating them into large common entities. In addition, there is an innovative approach to the composition of these bodies, which reflects the concern of the Quebec government to encourage participation by parents in school management: a third of the seats on a school board must be held by parents delegated by their school council, and of them, there must be Catholic and Protestant parents, proportionate to the Catholic or Protestant school population before the reform (since after the reform the rules governing denominational status have been changed) in schools located within the territory of the new language-based school board.

A majority of the members of the school council in each school must be parents. The council also includes teachers, representatives of the non-teaching staff, and the principal of the school (who is not entitled to vote). At the secondary level, the pupils in the higher grades also have a representative on the council. The school council determines the orientations of the institution, defines the educational scheme of the school and decides on its denominational status. The council is supported by a parents' committee with advisory status, a pupils' committee with the same status, and a teaching committee made up of teachers and professionals to decide on instructional methods and text books.

There has been scrupulous provision made for implementation of the reform. The minister of education conducted consultations with all the participants, and published the new school map in the Official Gazette of March 12, 1985. Of 247 institutions now in existence, there will remain 125 French-language boards, 13 English-language boards, four denominational boards reduced to their 1867 territories, and dissentient boards. Elections must be held on June 17. If the territory of the school board remains unchanged, the elected commissioners must combine with parents from the school committees already in place, who must occupy one-third of the seats, and together these will make up the provisional board. If the territory has changed, there must be a provisional board, two-thirds of which are elected members and one-third of which is parents, and the provisional board is to carry out the work of the reform. Its role is to:

- establish a three-year plan for use of material and buildings;
- establish a list of schools to be kept by the school board in its territory;
- designate the religious status of the schools: Catholic, Protestant, multi-denominational or neutral;
- issue a deed of establishment to its schools, to come into effect on July 1, 1986;
- establish the various committees of the school;
- adopt procedures for consulting with schools;
- allocate teaching services;
- provide for transport;
- provide for services to adults;
- establish admission criteria for pupils;
- carry out enrolment for 1986-87;
- approve the 1986-87 school budgets;
- allocate financial resources among school;
- prepare and adopt the 1986-87 school board budget;
- set the 1986-87 tax rate.

Any dispute must be settled by the minister of education. But because of legal challenges by the denominational school boards in Montreal, based on section 93 of the BNA Act, the reform will not occur; the minister has announced that he will not prepare a voters' list for the June 19, 1985 elections. The list was to indicate the parents' choice to support French-language or English-language boards, and taxpayers' choice of boards as well.

The provisions of Bill 57 for taxes were retained, except as regards denominational boards. As well, in order to comply with the judgment of the Supreme Court, the government introduced Bill 29, which limits the right to vote in elections to the CECM or PSBGM (and their counterparts in Quebec City) to Catholics or Protestants - a return to the strict interpretation of the right of management, given by the Privy Council in Hirsch.

The reform has been delayed. Once again, a rational reform of the school system has been blocked by section 93 of the BNA Act. However, given the earlier case law and section 23 of the Charter, the challenge appears to us to be without merit. When even the territory of the two denominational boards in Montreal would be frozen where it was in 1985 rather than 1867, which is uncertain, we believe that the Quebec Legislature has jurisdiction to reform the rest of the system; in addition, by virtue of the judgment of the Court of Appeal of Ontario, there will have to be room for English-speaking Catholics and French-speaking Protestants within the denominational school boards. French-speaking Protestants present the problem of a majority in the province which is a minority in the school structures of a region. We see a similar problem with the concept of proportional representation guaranteed in Ontario; this



will be considered in our general summary. The interaction of sections 93 of the BNA Act and 23 of the Charter will continue to cause serious problems for provincial legislatures.

### Conclusion

In the area of access to schools and the definition of English-language instruction, the rights of English-speaking Quebecers are comparable to those of the Acadians of New Brunswick. The minimum number required for instruction is one pupil; the normal rules apply to institutions, and the scattered nature of the pupil population is made up for by the provision of free transport, funded by the school board and the government. The right of access to English-language schools is governed by paragraph 23(1)(b) and subsection 23(2) of the Charter, and section 72 et seq. of Bill 101 continue to apply to cases not covered by those provisions of the Charter.

The rights of English-speaking Quebecers in the area of school management could be improved. They have no independent structures in the ministry of education. They still have no identified right to management structures, although in practice, as a result of their history, anglophones control the Protestant institutions. However, this principle will have to be reviewed; under section 23 of the Charter the language criterion is as important as religion in school management. While denominational rights are preserved in the Charter (section 29), language rights have taken on new importance. Bill 3 is an effort to reconcile these rights. It was supported by the Anglo-Quebec community, except for a few pockets of resistance. The decision not to implement the reform before the courts have ruled on it is founded upon the most laudable legal caution; now we will have to hope that the courts will be able to bring about harmonious reconciliation of the two constitutional provisions so that the rights of the English-speaking minority in Quebec can be strengthened.





**VI. French-Language Educational Rights  
in Ontario**



## 1. Fact situation

The CMEC Report indicates that since 1979 there has been a policy in Ontario of promoting establishment of homogeneous schools, preserving linguistically homogeneous educational units in mixed-language schools, making available vastly improved teaching, administrative and physical resources for these schools, and generally reserving access to French programs for students whose language of communication is French. However, we have found no guidelines in the Act, the regulations or other documents on this question; the CMEC report indicates that courses provided in the FLIUs\* are intended for francophone pupils. It should be noted that the Charter does not refer to the language of the pupils, and that instruction in French may legally be offered to non-francophones in specific circumstances: to assimilated francophones (23(1)(b)) and to anglophones whose children are receiving instruction in French (23(2)).

Ninety-five of the province's school boards, or slightly over half of the total 181, provide instruction in French; 80 of these administer French-language instructional units, and the other 15 have entered into agreements providing that their francophone pupils will be transported to a neighboring school district to receive instruction in French. French-language instruction is provided in both homogeneous and mixed schools, with homogeneous schools making up a greater proportion of elementary schools than of secondary schools. Two hundred and ninety-five, or about 8%, of the province's elementary schools offer FLIUs; the vast majority of these schools - 281 - are homogeneous. At the secondary level (grades 10 to 12), there is a greater flexibility, and school boards may vary the time for French-language instruction. Ten per cent of secondary schools offer FLIUs- 65 out of 643. However, these schools are divided almost equally between homogeneous (33) and mixed (32) schools. The table of percentage of instruction time in French indicates that the percentages decline substantially at the secondary level to between 65% and 70%, from a level of between 88% and 95% at the elementary level.

While there has been progress in Ontario in recognition of minority rights, there remains much to be accomplished in actually implementing these rights. Before considering the development of minority language rights, we shall first examine the denominational school system in Ontario.

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\* FLIUs are French-Language Instructional Units, which are instructional units providing instruction in French within the meaning of the Charter.



## 2. Denominational schools

There is no longer any doubt about the existence of denominational schools in Ontario or about the survival of the system, since the provincial government announced that it would provide full funding for the separate school system.<sup>1</sup> These denominational rights do not affect language nor, it would appear, departmental structures. A study of the extensive case law in Ontario on this question will provide a fuller picture of the separate school system in the province.

The constitutional rights of the Catholic minority in Ontario arise primarily from the Separate Schools Act of 1863.<sup>2</sup> However, the first school legislation of any importance in Upper Canada was the Common Schools Act,<sup>3</sup> which provided for elementary public schools (from grade 1 to grade 9). These schools were required to be non-denominational and were funded both by the province and by local taxes.

The 1859 Act replaced Upper Canada's board of public education with a department of education responsible for public and separate schools.

By virtue of the Separate Schools Act of 1863, five Catholics could call a meeting for the creation of a separate school. If the meeting supported the proposal, trustees were elected, who formed a corporation with the power to impose taxes on all parents who sent their children to the school; section 7 provided that the trustees would assume the same powers for separate schools as would the trustees of public schools. Section 13 required that teachers hold a provincial certificate, and section 26 provided that the separate schools were subject to the normal regulations of the board.

Since the separate school trustees had the same rights as public school trustees, it is necessary to examine the public school situation.

The powers held by trustees were quite extensive. Section 79 of the Common Schools Act of 1859 sets out the most significant of these powers, including the right to select school sites, to provide textbooks, to implement and develop programs, to hire teachers and to enrol pupils residing in the district.

Beginning in 1854, when the separate school system existed but had no legal status, the Court of Appeal required that the trustees of public schools in a district where there was no separate school to

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1. The constitutionality of this funding is being challenged.
  2. (1863), 26 Vict., c. 5.
  3. (1859), 22 Vict., c. 64.

admit all pupils - including colored pupils - pursuant to the Common Schools Act of 1849;<sup>4</sup> however, when there was a separate school, all Catholics were required to attend that school and had no freedom to choose.<sup>5</sup>

However, if the separate school in a district was closed, the right of Catholics to attend the public school was automatically restored.<sup>6</sup> In addition, a Protestant could not choose to support the separate Catholic schools.<sup>7</sup> Separate school trustees had (and so still have) the power to levy taxes to construct new schools, but until a separate school was established a Catholic taxpayer was required to pay the public school tax.<sup>8</sup> It was also decided that the procedures for establishing separate schools were mandatory, and no meeting of fewer than five residents could validate the subsequent creation of a separate school.<sup>9</sup> It should be noted that this rigid approach by the Court of Appeal in dealing with procedures affecting separate schools would probably no longer be acceptable in the context of section 23 of the Charter, and rather reflect the restrictive attitude of the time.

As we noted above, teachers in separate schools had first to be qualified to teach in the public schools. This procedure was a disadvantage for francophones, who could not at that time obtain teacher training in their language, but there was only one exception to the rule, for members of religious communities who had taught in the schools before 1867.<sup>10</sup> In one interesting case, the residents of a district, where there was no separate school, were authorized to give their support (and their taxes) to a separate school located less than three miles away, but in the neighboring district.<sup>11</sup> Thus

4. [1849] UC, c. 83.

5. Washington v. Charlotteville School Trustees (1954), 11 CQB, p. 569; Re Hill, id., p. 573; Re Hutchison (1871), 31 CQB, p. 274.

6. Re Stewart (1864), UCQB, p. 634 (Ont. CA).

7. Re Ridsdale (1862), 22 UCQB, p. 122.

8. Free v. McHugh (1864), 24 UCCP, p. 13.

9. Arthur RC Separate School Trustees v. Arthur (1891), 21 OR, p. 60.

10. Brothers of Christian Schools v. Ontario Minister of Education, [1907] AC, p. 69.

11. Sandwich East RC Separate School Trustees v. Walderville (1905), 10 OLR, p. 214.

there was already recognition in dealing with denominational schools of the need not to rely on school district borders - an approach that has been perpetuated in establishing French-language schools and in determining "where numbers warrant." In Ontario, as in Quebec, there was recognition of the rights of school trustees (and not of municipal councils) to impose school taxes, although they were collected by the municipalities.<sup>12</sup>

We now come to one of the two leading cases in Ontario dealing with denominational schools: the Mackell decision. This case was preceded by a contempt of court judgment against the French-speaking trustees who had violated an injunction forbidding them to authorize the use of French in their schools; their attitude was described by the judge as follows: "The conduct of the respondents in disregarding and defying the interpretation of the law by the highest court of the province can only be described as recalcitrant and recusant."<sup>13</sup>

Mackell<sup>14</sup> raised the question of the interpretation of the Separate Schools Act of 1863 as it related to subsection 93(1) of the Constitution Act, 1867. At the outset, the Privy Council indicated that this subsection covered Catholics, whether French or English-speaking, and that the "class" referred to in 93 was to be determined according to religious belief, and not by language. This was clearly an indisputable interpretation, which flowed directly from the wording of 93. However, the judicial committee went on to state that such class "cannot be subdivided into other classes by considerations of the language of the people by whom that faith is held,"<sup>15</sup> and it is here that we might question the correctness of the committee's reasoning; it was precisely that which the Court of Appeal of Ontario did in the ACFO case, when it ordered that the separate schools be subdivided on the basis of language. Certainly the prime reason for this recent opinion by the Court of Appeal is the entrenchment of language rights, while in 1917 there was no provision to support that opinion, and the wording of 93 in fact did not permit any such conclusion to be drawn. While the Constitution at the time did protect the religious minority, there was nothing in section 93 to guarantee the rights of the linguistic minority as well.

In any event, that was not the appellants' main argument. Like Quebec Protestants in 1976, Ontario Catholics in 1971 were arguing that the rights to administer the school system, conferred on them by their separate status and by the pre-Confederation legislation, included the right to determine freely the language of instruction.

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12. Re Therriault (1914), 15 DLR, p. 675.

13. MacDonald v. Lancaster Separate School Trustees (1916), 29 DLR, p. 731.

14. Ottawa RC School Trustees v. Mackell, [1917] AC, p. 62.

15. Id., p. 69.



Not too long before, the opponents of Bill 101 claimed that 93 guaranteed freedom of choice in Quebec, but this was not the essence of the argument in Mackell. There was a time when the existence of separate schools required that residents in the district support them, and there was no freedom of choice; however, the question was whether separate schools could offer instruction in French by virtue of a legal right to do so that existed before 1867. It was precisely this question that was answered by the judicial committee, in the manner that is by now familiar to us. Although the trustees could freely choose "the kind of school," this right did not include the right to determine the language of instruction; rather, the law referred to girls' schools, boys' schools, and so on, but not to a school of one language or another. This interpretation, in our opinion, must be read with caution. The judicial committee might well have taken a different approach in another context. Moreover, in Manitoba, the same right (to determine "the kind of school") conferred on the regular school board was seen by the Court of Queen's Bench of Manitoba as including the right to establish single-language schools; however, it should also be noted that the right to instruction in French had already been recognized, in another provision of the Schools Act.<sup>16</sup> Thirdly, the judicial committee questioned the effect of the circular on separate schools: had their rights been prejudicially affected? Again, the answer was no: no aspect of the circular affected the religious character of separate schools. The right to manage has no linguistic aspect; the constitutional right to administer the schools did not then and does not now include the right to determine the language; on the contrary, the trustees' right to manage the schools is subject to the regulations applied generally by the department, which under the Common Schools Act of 1859 (and the Separate Schools Act of 1863, which reproduced the same provision) could include the aspect of language. The right of the school board to hire teachers is also limited by the requirement that such teachers be qualified and hold a provincial certificate, and the Act authorized the Board of Public Instruction to impose conditions - including conditions as to language - for obtaining a certificate.

This reasoning is not incorrect per se; however, it certainly does not err by excess of generosity. The judicial committee could have recognized that the language of instruction and teachers' language qualifications were an important aspect of local school management. It could be argued that the language of education is part of the local administrative elements of school management. It appears to us that on this point the attitude and approach taken by the judges was at least as influential as was the legislation itself. While it is certainly indisputable that section 93 of the Constitution Act, 1867 protects persons who have a common religion,

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16. Cf., Damus v. Trustees of St. Boniface School Division (1980), 108 DLR (3d), p. 530.



and not a common language, the other aspect of the problem - the right of a separate school board to determine the language of instruction - should be approached with greater sensitivity. Except for the provision in the legislation in 1867 that the school board was generally subject to provincial regulations, no legislation existed governing the language of instruction in Ontario, which was determined at the local level. There is nothing therefore to prevent us from arguing that language was implicitly part of the management rights of local authorities, and is therefore protected by 93, not as a language right but as a right ancillary to the management powers of the school boards. However, this argument was not accepted by the courts, and the case law appears to have firmly established that section 93 of the BNA Act, 1967, does not support a claim for constitutional protection for language rights.

On the other hand, since pre-Confederation legislation was silent on the question of language of instruction, but granted primary jurisdiction over education to the provincial legislatures, it could be argued that, on the contrary, Mackell is well founded, and the absence of any provincial language regulations conferred simple de facto power on the local school boards, which could be withdrawn when the legislature decided to occupy the field. Unfortunately for the proponents of the contrary opinion, the judicial committee expressed its position clearly, and the subsequent case law, including the decisions of the Superior Court of Quebec,<sup>17</sup> adopted it. However, the debate has not ended, and we should not dismiss language rights arguments based on separate school boards' management rights out of hand without closer consideration.

Immediately after Mackell the judicial committee confirmed the rights inherent in the right to denominational schools, that is, the right to elect school trustees and to have them manage their educational institutions freely. In Ottawa RC Separate School Trustees v. Ottawa Corp.<sup>18</sup> the provincial legislation providing for the suspension of recalcitrant school trustees and their replacement by a management commission appointed by the minister (in other words, a trustee) was held to violate section 93 of the Constitution Act, 1867, whether or not the power was exercised.<sup>19</sup> (On the facts, the provincial government had taken that measure in Ottawa in 1915 when the Catholic trustees refused to comply with Regulation 17, and threatened to close their schools.) The judicial committee acknowledged that the protection granted by 93 covered all Catholics, and not their trustees, but that 93 protected precisely that right,

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17. Cf., Bureau des écoles protestantes du Grand Montréal v. Procureur Général du Québec (1976), CS, p. 430; Greater Hull School Board et al. v. Procureur Général du Québec, SCC, December, 1984.

18. [1917] AC, p. 76.

19. [1915] 5 Geo., c. 45, s. 3.

to elect trustees. The judicial committee adopted the argument based on the difference between denial and limitation, well before the question became so current:

It is possible that an interference with a legal right or privilege may not in all cases imply that such right or privilege has been prejudicially affected. It is not necessary to consider such a possibility, and this question does not arise for decision in the appeal. The case before their Lordships is not that of a mere interference with a right or privilege, but of a provision which enables it to be withdrawn in toto for an indefinite time. Their Lordships have no doubt that the power so given would be exercised with wisdom and moderation, but it is the creation of the power and not its exercise that is subject to objection, and the objection would not be removed even though the powers conferred were never exercised at all. To give authority to withdraw a right or privilege under these conditions necessarily operates to the prejudice of the class of persons affected by the withdrawal.<sup>20</sup>

It is therefore clear that while the extent of the rights of separate school trustees may not be clearly defined, the existence itself of the system can no longer be questioned, without there being a constitutional amendment.

The end of this chapter in Ontario educational history came three years later, with the decision in Ottawa RC Separate School Trustees v. Quebec Bank.<sup>21</sup> Lord Dunedin, delivering the opinion of the judicial committee, opened with these words, in fact: "The present case is what it is to be hoped is the last chapter of the history of the unfortunate disagreement between the Board of the Roman Catholic Schools and the educational authority of the City of Ottawa."<sup>22</sup> This time, the dispute involved a provincial statute that ratified retroactively the acts of the commissioners, although their legal existence had in fact been found unconstitutional. The Quebec Bank had advanced a considerable amount of money to the commissioners on a line of credit. They had spent the money, and the trustees claimed for reimbursement of the money, because the acts of the commissioners were void, and the legislation enacted to ratify their acts was therefore also void. The trustees claimed that their rights had been prejudicially affected. The judicial committee does not appear to have accepted this argument. At common law, the trustees' claim was obviously good; on the basis of the remedial legislation, it was easily dismissed. The question was therefore whether the legislation was valid, because if so the action would be dismissed; on the other hand, if the legislation was stricken down, the action would be allowed. In the opinion of Lord Buckmaster

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20. Id., pp. 81-82. Emphasis added.

21. [1920] AC, p. 230.

22. Id., p. 230.

(sic), the money had clearly been spent for educational purposes, and the trustees would not have used it better themselves; as a result, their rights had not been affected. Certainly, they had been deprived of the ability to manage the money, and this wrong had been corrected in 1917; but given that they would still have spent the money in the same way as the commissioners had done, to return the money to the trustees would amount to making them a gift of the money free of charge, and to financing the same expenses twice.

While we might have hoped that this would be the end of the guerilla war in the courts over Ontario schools, such was not the case. In Roman Catholic Separate School Trustees for Tiny v. R.,<sup>23</sup> the issue was the crucial question of the allocation of base funding and special grants between Catholics and the public system, the right to establish and conduct courses and programs, and the right of Catholics to exemption from paying rates for public secondary schools, vocational schools, collegiate institutes and other institutions not conducted by their own trustees.

The trustees had lost their case at every level, with only three dissenting voices in the Supreme Court. The judgment of the judicial committee was written by Viscount Haldane, who acknowledged the importance of the case at the outset: "But it is nonetheless a question of far-reaching importance to Canada as a whole, and it has given rise to great differences of opinion among the judges of the Canadian Courts." And later: "The question which has to be decided is one of far-reaching magnitude."<sup>24</sup>

He also recognized the need to understand the history of school legislation in Canada, and to examine section 93 of the Constitution Act, 1867, about which he stated: "That section embodies a compromise."<sup>25</sup> With respect to subsection 93(3),<sup>26</sup> the Privy Council noted: "In the first place, it applies not merely to what exists at the time of Confederation, but also to separate or **dissentient schools established afterwards by Provincial Legislatures.** ... That this is so [that 93(3) is broader than 93(1)] is shown by the extension of the power to challenge to any **system of separate or dissentient schools** established by law after Confederation ..."<sup>27</sup> Thus the new non-denominational system in Quebec would be legally included in the remedy set out in 93(3),

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23. [1928] AC, p. 363.

24. Id., pp. 366 and 368.

25. Id., p. 368

26. That subsection establishes the right of appeal to the Governor-in-Council for supporters of separate schools that existed before or after Union.

27. Supra, footnote 23, p. 369.



despite the political risks that might accompany resurrecting it. It would therefore appear that 93(3) is intended to cover general changes to the entire school system in a province, which would in some way affect the rights of separate school supporters.<sup>28</sup> While such a general change could be permitted, it could not take away from separate schools in existence at the time of the change any rights that they then had. Subsection 93(3) therefore affects the interpretation of subsection 93(1), and limits the latter:

The rights and privileges there referred to must be such as are given by law, and the redress which may be given in respect of prejudice to them, caused by laws made by the Provincial legislatures which, in other respects, have the exclusive power of legislation in relation to education, is a redress based on **the principle of ultra vires ... sub-s. 1 should be construed as being confined strictly to questions of ultra vires.** <sup>29</sup>

This passage from the Tiny decision must be taken as an attempt to clarify the **nature** of the two remedies rather than their scope: 93(1) provides a remedy in the courts against an ultra vires measure; 93(3) provides a political remedy against any provincial measure that affects any right that Catholics may have had or have, before or after that province entered the Union.

Thus the effects of subsection 93(1) were clarified somewhat, in agreement with the position taken in Brophy. The legal nuance between a statute being ultra vires and being inoperative because it contravenes a fundamental right did not yet seem to have taken root in the fundamental rights vocabulary of the time. This passage from Tiny provides some guidance on the scope of the two controversial subsections of section 93: the first is limited to a legislative change that would deny the rights of existing denomination schools, while the second would apply to a change in the entire provincial school system affecting denominational rights in general.

The judicial committee then considered the development of the Ontario school system, to determine whether in 1863 Catholics had the rights for which they were now claiming the protection of 93(1).

Catholics offered secondary courses at their own expense, while public secondary schools were only established after Confederation. Thus in Tiny Catholics claimed to have the right to maintain secondary programs "free from control or regulation by the legislature of Ontario;"<sup>30</sup> secondly, they claimed a share of the grants paid to public secondary schools, based on the number of students who attended the separate system; thirdly, they claimed to be exempt from taxation for public secondary schools.

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28. See Brophy v. AG Manitoba, [1894] AC, p. 202.

29. Emphasis added (pp. 372-373).

30. Id., p. 375.



The judicial committee did not allow any of these claims. Given their restrictive approach to 93(1), which was limited to ultra vires legislation, leaving 93(3) as a necessary alternative, the judicial committee held that history did not support the Catholic position. We have already considered the two major pieces of provincial school legislation, the 1859 and 1863 statutes, in our examination of the Mackell case; the previous situation may be summarized as follows:

- gifts of land for largely uncontrolled grammar schools;
- 1807: These schools are designated as "public schools" and trustees are appointed;
- 1816: These schools are renamed "common schools" and money is paid to them; the trustees must report to the province, which controls local regulation and the books used;
- 1820, 1824, 1833: Provincial grants are paid to common schools and grammar schools;
- 1841: A superintendent of education is appointed with responsibility for unifying the school system. Note that the person appointed was Egerton Ryerson, the great architect of school unification. The system became public, and covered the entire province with schools of equal quality; the government took a larger role in developing the system. As well, while the 1841 Act did not use the expression "separate schools," it created the first mechanism for educational dissidence on religious grounds;
- 1846: The powers of the superintendent were strengthened, and separate schools subject to provincial regulation were recognized officially;
- 1855: Taché Act (separate schools): the procedure for establishing schools was strengthened, with taxation power given to trustees, and exemption from taxes for common schools; there was also a right to a share of public funds, proportionate to the average attendance at schools;
- 1859: Common Schools Act;
- 1863: Separate Schools Act.

In the opinion of the judicial committee, access to funds was limited to a proportion of the funds appropriated by the legislature for common schools.<sup>31</sup>

The judicial committee acknowledged at the outset that "the Provincial Legislature is supreme in matters of education, excepting so far as s. 93 of the British North America Act restricts its authority."<sup>32</sup> It also acknowledged, in a frequently quoted passage, that because of this basic principle the province had always reserved the right to "mould the educational system in the interests of the

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31. See Greater Hull School Board et al., supra, footnote 17, which required that funds be allotted proportionately.

32. Supra, footnote 23, p. 385.

public at large."<sup>33</sup> As a result, "the separate school was only a special form of common school, and the Council could in the case of each determine the courses to be pursued and the extent of the education to be imparted" (p. 387). Later, the judicial committee noted that in pre-Confederation legislation there was "a real control of the separate schools."<sup>34</sup> With respect to access to public funds, it was held to be limited to the money remaining for the common schools after the payment of special grants, both before and after Confederation.

New financing mechanisms provided for the appropriation of money for secondary schools, which left less on the plate for the common schools. The judicial committee did not find this to be a problem: this reorganization of the Ontario school system might affect the rights of separate schools, but they could always rely on subsection 93(3); the new measures were not ultra vires.

It is interesting to compare this reasoning with the reasoning of the majority on the Court of Appeal of Quebec in Greater Hull Protestant School Board.<sup>35</sup> In that case, the Court of Appeal had stricken down provincial legislation intended to restructure school funding and to limit the ability of school boards to impose taxes. It was held that these measures prejudicially affected the pre-Confederation rights of dissentient school boards. The Tiny case was barely considered; however, the general problem presented by these two decisions received similar treatment. The Supreme Court endorsed the position taken in Tiny and held that the legislature had a wide margin to manoeuvre in structuring educational financing. We should note a number of points here, however. Chouinard, J. in the preamble to his judgment, quoted passages from decisions of the Supreme Court<sup>36</sup> that had been more favorable to the protection of the religious minority and the rights of such a minority to exclusive control over financing and instruction in its schools. Denominational school systems have a certain set of powers, which have nothing to do with the religious aspect.<sup>37</sup>

The fine differences between these two decisions illustrate the problems in applying a general constitutional guarantee to specific situations. In our opinion, there are a number of factors which explain the differences that appear between the decisions of the judicial committee and the recent opinions of the Supreme Court.

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33. Id., p. 386.

34. Id., p. 387.

35. Supra, footnote 31.

36. Hirsch v. Protestant Board of School Commissioners of Montreal, [1926] SCR, p. 269.

37. Greater Hull School Board et al., supra, footnote 31, p. 131.

- The reliance on history is the prime factor. The history of the school system in each province is different, and when we interpret the constitutional provision in each province according to the state of provincial law at a particular time, we must anticipate different, if not contradictory results. In interpreting section 23 of the Charter, we will have to be careful not to inject elements based exclusively on the state of the provincial law at the time it was enacted, and rather to give it its own context.
- The very wording of section 93 was intended to preserve existing rights, and has been interpreted in that way; section 23 of the Charter, on the other hand, appears to be a remedial provision, judging from the judicial comments made on it to date. Our examination of history will therefore have a quite different objective: in the first case, the question was what rights had to be preserved; in the second, the question is what must be corrected.
- The philosophy of constitutional interpretation has evolved, and in a century there has been a complete swing of the pendulum. When the judicial committee took its first steps in constitutional interpretation, it at times gave immoderate attention to the rights of the provinces as against federal encroachment and protection of minorities. Nor did constitutional protection of minorities enjoy the favor of the English legal community, imbued as it was with the notions of individual equality and the virtues of the common law. The modern Canadian legal community has behind it the Universal Declaration of Human Rights, the development of human rights legislation, the entrenchment of fundamental rights in the Constitution, and an increasingly open debate on all these questions. Today's approach to constitutional guarantees appears to be more fundamental and less legalistic. If the Tiny case were heard today, it might have a different outcome.

Nevertheless, we still have variations from province to province in the application of 93, and these differences may also arise in the "flexible" application of section 23 of the Charter. The entrenched principle of respect for denominational rights, however, has been applied differently in different provinces, and the result could be inequality. We will therefore have to distinguish between the substance of the right and the implementation of the right.

Since Tiny, the Ontario courts have considered the limits of 93 in a number of other cases.



When a ratepayer wants to be assessed as a separate school supporter, he or she is automatically exempt from payment of public school taxes.<sup>38</sup>

In Tygat v. Tufflemir,<sup>39</sup> the requirement that a separate school supporter reside within three miles on a straight line from the school was interpreted to include the cultivated land at one end and the school property at the other - "property to property." On the other hand, in Re Forestall,<sup>40</sup> the board refused to admit pupils who resided beyond the three miles from a property purchased by the trustees, but not intended to be used for constructing facilities. In Connie v. Leroux,<sup>41</sup> it was held that it was impossible to redirect school taxes so long as the separate school had not be established. In Vande Khove v. Middleton,<sup>42</sup> it was decided that the union of two separate schools, followed by the closing of one of the two, entitled any separate school supporter residing within three miles from either of the schools to direct taxes toward the school that remained open.

Similarly, in Crowland Twp: v. Slevar,<sup>43</sup> the Supreme Court affirmed a principle that was clearly expressed in the legislation: a separate school supporter is responsible only for annual public school taxes imposed before he or she supported the separate school or before the separate school was built. In Leblanc v. Board of Ed. Hamilton,<sup>44</sup> the public school board was forced to admit the children of a separate school supporter free of charge when they moved into a house assessed for public school taxes.

More recently, the Court of Appeal of Ontario considered the rights set out in 93 as they relate to hiring teachers. The facts in Re Essex County RC Separate School Board and Porter<sup>45</sup> were simple: two teachers employed by the separate schools were dismissed because they had entered into a civil marriage. A board of reference was established under the School Administration Act,<sup>46</sup> and ordered that the employees be reinstated.

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38. McCarthy v. Hird, 1947, OR, p. 615.

39. [1915] OR, p. 475.

40. [1963] 1 OR, p. 632.

41. (1956), 2 DLR (2d), p. 749.

42. [1962] SCR, p. 75.

43. [1960] SCR, p. 408

44. [1963] 1 OR, p. 20

45. (1979), 89 DLR (3d), p. 445.

46. RSO, 1970, c. 424.



The school board trustees challenged this decision, and were successful in divisional court. The judgment read in part:

I take it to be obvious, that if a school board can dismiss for cause, then in the case of a denominational school cause must included denominational cause. Serious departures from denominational standards by a teacher cannot be isolated from his or her teaching duties since within the denominational school religious instruction, influence and example form an important part of the educational process.<sup>47</sup>

This power existed in 1867 and in the court's opinion was part of the rights and privileges guaranteed by the Constitution. As a result, the board of reference could have no jurisdiction over these questions, because the legislature did not have the power to give it such jurisdiction. The case has recently been reversed in the Court of Appeal.<sup>48</sup> The Court of Appeal held that while 93 forbids legislation that is contrary to the rights of denominational school supporters, it does not prevent the parties from derogating from those rights by an agreement in the nature of a collective agreement. Under this collective agreement, the parties had agreed to arbitration; while the legislature cannot affect denominational rights, the parties themselves may do so, and will be subject to the jurisdiction of the arbitrator. This case may be compared to a recent Newfoundland judgment which affirmed that section 17 of the Terms of Union of Newfoundland with Canada, which essentially sets out section 93 of the Constitution Act, 1867, did not prohibit the legitimate application of collective agreements and statutory provisions for the negotiation of collective agreements.<sup>49</sup>

This examination of the Ontario cases provides an overview of the effects of 93 in Ontario, which may be summarized as follows:

- denominational education rights exist in Ontario, and the survival of separate schools is assured;
- section 93 does not guarantee the rights of linguistic minorities;
- the language of instruction is not included in the right of school trustees to manage their schools;
- however, 93 protects the right to autonomous school structures;

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47. Supra, footnote 45, p. 447.

48. (1984), 5 DLR (4th), p. 665.

49. R v. SB Exploits-White Bay et al. (1983), 147 DLR (3d), p. 186.

- 93 does not protect secondary schools in Ontario;
  - 93 permits the government to restructure provincial funding;
  - 93 permits school boards to exercise denominational control over hiring teachers, but the parties may renounce this right under a collective agreement. In a recent opinion, Professor Hogg drew four conclusions from these cases:
- (1) Any legislation intended to destroy the exclusively denominational nature of the separate schools, with respect to taxpayers, trustees and students, is invalid. (Hirsch v. Montreal Protestant School Commissioners, [1929] AC, p. 300)
  - (2) Any legislation abolishing the right of elected trustees to manage separate schools would be invalid. (Tiny RCST v. R., [1928] AC, p. 363)
  - (3) Any legislation intended to regulate separate schools, or even to decrease their funding without threatening their existence or their denominational nature, is valid. (Tiny RCST v. R., [1928] AC, p. 363)
  - (4) Any legislation that does not prejudicially affect separate schools is valid (Belleville RCST v. Granger (1878) 25 Gr. p. 570; Regina Public Schools v. Gratton Sep Schools (1914), 18 DLR, p. 577).<sup>50</sup>

### 3. Access to French-language schools

Ontario, with the largest French-speaking minority of any province in Canada, has had to pay special attention to developing appropriate educational services. History has shown that this was not always the case. The first school legislation in Upper Canada was enacted in 1809,<sup>51</sup> but it will be recalled that it was during the years from 1844 to 1880 that the implementation of the school system developed under the influence of Ryerson took place in Ontario. Only in 1863 were separate denominational schools recognized. Francophones, who were for the most part Catholic, took advantage of this system, but the under-financing of separate schools did not assist in the development of a quality separate school system. The evidence in the Court of Appeal in the ACFO<sup>52</sup> case showed that regulations adopted in 1889 imposed a strict requirement of English-language education, except when the pupils did not understand English. There was also, of course, the infamous Regulation 17, adopted in 1912, which prohibited the use of French as a language of instruction.

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50. P. Hogg, l'Ontario a le pouvoir d'établir un Conseil Scolaire de langue française, Télé-Clef, 1985, No. 1, p. 25.

51. 47 Geo. III c. 6.

52. Infra.

In Mackell, a decisive case in the interpretation of section 93 of the Constitution Act, 1867, it was held that there was no legal way of quashing this regulation at that time. The regulation was not applied with great energy. Franco-Ontarians resisted it, and continued to operate French-language schools, although they were almost exclusively within the separate school system. In 1963, taxes on corporations were allocated in proportion to the enrolment in the two systems, to be of benefit to French-language schools. In 1968 there were significant changes to the language provision of the Education Act which improved the situation. These amendments provided that French would be authorized for use in elementary school, and for history, geography and Latin courses in secondary school; slightly later that year French was permitted in all subjects in all grades. In 1974, Part XI of the Education Act was completely revised along the lines that were later found by the Court of Appeal of Ontario to be unconstitutional.

(a) Reference to the Court of Appeal of Ontario

The Reference re Education Act of Ontario (which we shall refer to for convenience as the ACFO case) was greeted as an important victory by Franco-Ontarians. The immediate effect of the decision was to grant to Franco-Ontarians a measure of control over their schools, but the legal effects will extend well beyond that in the development of judicial interpretation of section 23. We propose here to examine the decision in the broader context of the application of section 23. In general, there are five aspects of interest to us: the nature of section 23; the illegal aspects of the provincial legislation in relation to 23; the right to manage the schools and to have homogeneous schools; the effect of 23 on protected denominational schools, and finally, the role of the courts in implementing the rights conferred by 23.

1) The nature of section 23

The Court of Appeal of Ontario drew on a variety of sources in interpreting section 23 and deciding on the nature of that section, some of which were surprising. As legal observers expected, history was one of the factors to which the court attached great importance. An entire section of the judgment is devoted to an examination of the development of Franco-Ontarian education rights; on a number of occasions, the court noted that the absence of education rights had led to the historic decrease in the size of the Franco-Ontario community.

Section 27 of the Charter, which some had seen as a possible threat or basis for an interpretation that would go against Franco-Ontarians, turned out to be an aid to a liberal interpretation of section 23. The court connected education with culture, and found in section 27 an additional source of ammunition against the Ontario legislation and in support of reading 23 to include the right of Franco-Ontarians to manage their own schools.



In Quebec Association of Protestant School Boards et al. v. Procureur Général du Québec<sup>53</sup>, Chief Justice Deschênes had held rather that the rights in 23 were guaranteed to individuals, and were not collective rights. His judgment also considered the application of section 1 to section 23, the reasonableness of the grounds Quebec had relied on in opposing section 23, and the question of the "denial" or "limitation" of the rights guaranteed in 23. In so doing, Deschênes, J. also set aside the number criterion for the operation of 23, set out in subsection 23(3). The Court of Appeal of Ontario took a different approach to section 23: it considered that this section was a remedial provision intended to strengthen Canadian unity. The concept of bilingualism, which was already recognized in Canada, is now part of the Constitution, and the Charter is in effect a code which establishes minority-language education rights.

By taking this approach based on bilingualism, the court adopted an interpretation that would strengthen the cultural aspect of the minority education facilities. As well, some passages of the judgment refer to the need for francophones to have access to institutions that reflect their cultural identity. On a number of occasions the court referred to minority language educational facilities of or appertaining to the linguistic minority. However, at other times, the court seems to lean toward an interpretation of 23 that would permit freedom of choice in the language of instruction, a concept which promotes individual bilingualism but mixes the linguistic communities and the official languages and, as the evidence in the SANB case<sup>54</sup> indicated, also promotes assimilation into English. On this point, Richard, J. also held in favor of freedom of choice in the language of instruction, but acknowledged that the provinces had jurisdiction to prohibit or restrict such choice.

The tendency toward constitutional freedom of choice, which has never been explicitly decided but which underlies the current judicial analyses of section 23, could eventually obviate the efforts of francophones to establish homogeneous schools. If francophones indeed wish to have such schools, they should be aware of the long-term effects of this approach to section 23.

## 2) Inconsistency of the Education Act and section 23

It is on this point that the judgment may be most useful in subsequent judicial interpretation of section 23. A number of aspects of the Ontario Education Act, similar to those found in other provincial school legislation, were found to be inconsistent with the Constitution. We shall consider these points individually.

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53. [1982] CS, p. 673.

54. SANB v. Minority Language School Board No. 50 (1983), 48 NBR (2d), p. 361.



## 2.1) Language of the children

The Ontario Education Act, like many others, bases the calculation of the number required to establish a class or school on the language of the children. Only francophone children - whose parents request a class or school - could be counted for the purpose of establishing a French-language class or school. The Charter, of course, does not employ this criterion. Without going into a discussion of the reasonableness of this limit, the court found that such a requirement was contrary to the Charter. This interpretation was somewhat precipitous. In fact, section 1 of the Charter could have been used (and may still be used in other cases) to argue that it would be unreasonable to permit assimilated children of French-speaking parents to attend a French-language school. Richard, J. had held that this class of children had the right of access to an English-language school, and in order to attend the French-language school would have to have a practical knowledge of French. However, the Court of Appeal of Ontario removed the requirement that the children in a French-language school be francophone themselves. It stated clearly that the language of the children was of no significance. The school structures will therefore have to adapt to this potential group of new students in French-language schools.

## 2.2) Discretion of the school boards

The Court of Appeal of Ontario held that the provisions of the Education Act conferring on school boards total discretion to decide whether the number of children required by the Act can be attained were invalid. In our opinion, this is the most innovative aspect of the judgment. A number of commentators have worried about the traditional discretion of school boards over matters within their jurisdiction, and the reluctance of the courts to review the manner in which that discretion is exercised in the absence of bad faith or other grounds for challenge in administrative law. However, the court preferred to follow the line taken by all Canadian courts toward administrative powers, that is, to render them inoperative on the ground that the Charter does not authorize absolutely discretionary powers. Since section 23 imposes an objective, constitutional test, no limitation on the rights guaranteed in 23 can be left to the discretion of the school authorities, even if they act in good faith. The only permissible discretion is in objectively determining whether there are sufficient numbers.

A number of other provinces have educational legislation that delegates similar discretion; if they do not provide specific criteria, they will probably be found to be inoperative.

Contrary to the preceding point, an absolutely discretionary power cannot be justified on the basis of section 1. Absolute discretion has always been considered to be unreasonable in traditional administrative law, and this approach will be reinforced by the provisions of sections 1 and 7 of the Charter.

#### 2.3) The numbers required by the legislation

In the same vein, the court held that the number arbitrarily provided in the Act could not stand. In the opinion of the court, legislative provisions should rather establish criteria to guide the school boards, which will have to decide each case on the basis of the region in question. This means that section 23 may apply in different ways, depending on the region of the province where it is to have effect, and on the local conditions. While this approach appears to respect the underlying logic of section 23, it might lead to unfair results. Alternatives to the opening of a class or school will undoubtedly have a heavy influence on the final decision, so that in some urban regions it would be preferred to transport pupils to a school in a central location, because of the greater access to transportation and better traffic routes, while in more rural regions the same number of children could support the establishment of a class or school.

#### 2.4) Territorial limitations of school boards

In Ontario as in other provinces, school boards must decide how many children are required within their own school district. This practice could prove unfair, if a francophone community straddled two different school districts. The court disapproved of this restrictive approach, and applied section 23(3), which places no territorial limits, other than the borders of the province, on the education rights guaranteed in the Constitution, stating that the school boards must ignore the territorial limits of their jurisdictions. The court did not, however, suggest any alternative approach, but was undoubtedly thinking of agreements among local school authorities to establish a school and share the costs and administrative aspects.

French-language schools could thus be responsible to a number of different school boards; there is no specification as to the process of negotiation, the determination of what area is to be served by a particular school, the distribution of the tax burden or of administrative and financial responsibilities. As we shall see, the Court believed that these questions could be better settled by the legislature than by the courts.

## 2.5) Conclusion

The Court of Appeal of Ontario found four of the principal failings of the provincial Education Act to be unconstitutional: the provision that numbers be determined by the language of the children; the prior determination of a number in a provision to be applied throughout the province without variation; the discretion granted to local school authorities in determining the number; and the determination of the number on the basis of existing school districts.

It will doubtless have been noted that these four factors turn on the concept of numbers and the provisions of subsection 23(3). The judgment did not deal with any other problems relating to 23: immersion, freedom of choice, regional rather than provincial minorities and mother tongue.

## 3) Management of schools

The factor that attracted most public attention and legal interest was the statement of the Court of Appeal of Ontario that the Education Act of Ontario is inoperative to the extent that it does not guarantee that francophones will take part in managing the schools at the local level. This passage of the decision is more innovative in legal terms. The technique used for interpreting the French and English versions is interesting, but other than that the Court of Appeal put forward social considerations based more on fairness than on law. This approach indicates the importance of the historical and social context in constitutional interpretation.

There are two lines of thought in the court's reasons. The first is based on an analysis of the content of the legislation, the other on the context of the dispute. As we have noted, the first approach appears to be more "legal," and the second more concerned with social values.

The French and English versions of 23(3)(b) contain an ambiguous element, if not a contradiction. The French version refers to "établissement," while the English version refers to "facilities." The court referred to a few, incisive dictionary definitions, indicating that the French expression could mean a management structure, relying on Larousse and Robert for this interpretation. On the other hand, the English expression "facilities" refers strictly to physical sites.

And so the court had to make a choice; by adopting the broader approach of the French version, it demonstrated its intention to be generous toward linguistic minorities. It dismissed the approach proposed by the Attorney-General of Ontario, which was to interpret



each version on the basis of the other, and take the meaning that was common to both; rather, relying on *R v. Cie Immobilière BCN Ltée*,<sup>55</sup> it preferred to abandon the narrower meaning when it was contrary to the intent of the legislation and defeated rather than assisted the attainment of its objects. The court added that the change to the French version at the time of the 1981 amendments supported the broad interpretation: the word "installations" had then been replaced with the word "établissements." In the opinion of the court, that was an indication of the intent of Parliament to extend the scope of 23(3)(b). Finally, the French version refers to an "établissement d'enseignement de la minorité," using the possessive rather than the descriptive form; the preamble to 23(3) also refers to the "langue de la minorité"; although the court found the English version, "minority language educational facilities" and "minority language," to be ambiguous, it determined that subsection 23(3) was intended to refer to the facilities belonging to the minority.

The court went on to seek a distinction between 23(3)(a) and (b), and in our opinion this argument is not correct. The court stated that the physical facilities are already covered by the term "instruction" used in 23(3)(a), and that there would be no need for paragraph 23(3)(b) if its only purpose related to physical facilities. Paragraph 23(3)(b) contains greater guarantees than the previous paragraph, and more than French-speaking teachers teaching in Ontario classrooms in which French-speaking children are taught in French. Similarly, the "numbers warrant" test would be different in the two paragraphs; logically, paragraph (b) requires a greater number than does paragraph (a).

But the court did not take this reasoning to its logical conclusion. The distinction between the two paragraphs lies in the nature of the rights conferred: in the first case, as the court noted, the question is of French-speaking teachers teaching French-speaking children in French; in the second case, it is a question of bringing such classes together into a single physical location, a facility. This is indicated by use of the word "includes" at the beginning of paragraph 23(3)(b). This expression must be read together with the preamble to subsection 23(3), which describes the right that is subject to the conditions then set out in paragraph (a) and (b). This right, which is conferred on individuals who meet the requirements of subsections (1) and (2), is to have their children receive instruction in the minority language. To avoid any ambiguity and to indicate the intent to specify two different numbers tests, Parliament decided to specify that the right to have the children instructed includes in certain circumstances (i.e. where numbers warrant) the right to have them instructed in educational facilities. This is the only purpose of 23(3)(b): to specify the nature of the right guaranteed and to set out the numbers test that will apply. The only real difference of opinion is

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55. [1979] 1 SCR, p. 865.



therefore over the meaning of the expression "minority language educational facilities," which the court decided to interpret liberally. However, if the court intended to say that homogeneous schools were already guaranteed by 23(3)(a), in our opinion it erred.

The second line of argument is based on the context in which section 23 is found. The court referred to sections 15 and 27 in order to provide a more solid foundation for its interpretation. Section 15 is not really legally relevant, since it was not yet in effect, but it should be noted that 15 will undoubtedly have unforeseen effects in Canadian law. If it is to be used in support of equality between a minority and a majority, leading to a very broad interpretation of the Constitutional provisions, there will doubtless be grave implications in the case by case application of section 23: we could think immediately of the question of quality of instruction and of related facilities, a problem that is already arising.<sup>56</sup>

Section 27 of the Charter permitted the court to link 23(3)(b) to French-language culture. Because the Charter must be interpreted in a manner consistent with the preservation and enhancement of cultural diversity, and because there is a close connection between education and culture, paragraph 23(3)(b) must permit French-speaking citizens to transmit their culture through the school system, with the logical implication that they must be able to control and manage their schools. However, the court's logic here, and this generosity and favorable approach to Franco-Ontarians, was counterbalanced by the court's approach to anglophones whose children attend French-language schools, as we shall see.

Finally, the court took the approach proposed by a number of professors and Charter commentators, and looked to the mischief that 23 was intended to correct. The mischief was assimilation, which is caused by the loss of the right to have French-language schools and the refusal of the local school authorities to meet the requests of francophones; the evidence presented to the court by ACFO demonstrated that this loss, and these refusals, were a result of the total absence of francophones in the management of the schools. There is nothing new in a court relying on extrinsic evidence to support a constitutional argument, but to adopt an historical argument by one of the parties without explanation, and to relate assimilation so directly to school management, might be surprising. Fortunately for minorities this approach was beneficial to them in this particular case; the evidence presented by ACFO (and set out in the schedule to the judgment) was very impressive. It should again be noted that extrinsic evidence can be of great importance in interpreting constitutional guarantees, and we now have concrete demonstrations of this importance. Use of such sources permitted the Court of Appeal to adopt the position that was most appropriate to a liberal interpretation of the legislation, which is what the applicant obtained.

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56. Marchand v. Simcoe Board of Education et al., Supreme Court of Ontario, not heard as yet.

The court concluded by noting the importance of school management in preserving the rights of denominational schools. This may be true, but we must keep in mind that these rights were already entrenched in the Canadian Constitution, a fact that was of considerable importance in protecting those rights.

The conclusion in this part of the judgment was open to criticism. First, the court stated that the right to participate in school management should apply to any user of French-language educational facilities, and not only to Franco-Ontarians. It goes on to say that the legislature will be responsible for safeguarding the situation, and that francophones and all users of the facilities must be guaranteed representation in the local school structures. They are to have exclusive control over all the relevant aspects of French-language instruction, including control over spending and the appointment of personnel to be responsible for providing the instruction and managing the facilities.

First, the court did not need to add this passage to the judgment; it was not essential to its answer to the question. It is an additional indication of the court's tendency to see more in section 23 than a right for francophones, but rather also a constitutional guarantee of limited freedom of choice in the language of instruction. The court noted that in its opinion 23 protects not only francophones (23(1)(a)) but also citizens - and not only those whose mother tongue is French - who received their primary school instruction in French (23(1)(b)) but no longer speak it - such as English-speaking children who had the benefit of a system in which they had access to French-language primary schools but then lost their French. Subsection 23(2) also protects English-speaking parents who have a child in a French-language school. In the opinion of the Court of Appeal, all these anglophones have a right to French-language instruction. This is somewhat removed from the protection of the minority culture; it is certainly not a prohibition on the children of anglophones attending a French-language school so as to preserve the linguistic and cultural identity of the school; there is no more talk of exclusively francophone school boards. The result of this approach is to imply that mixed schools, where English- and French-speaking children receive instruction in French together, would be constitutionally acceptable. This seems to be a form of return to the bilingual school, which is what Franco-Ontarians were hoping to avoid. Is this "additional protection" for francophones, the "affirmative action" permitted by 16(3) of the Charter? If section 23 of the Charter implicitly guarantees freedom of choice, does it also prohibit strict linguistic homogeneity? The question is a very serious one. Neither the Court of Appeal of Ontario, nor the New Brunswick Court of Queen's Bench, nor the Quebec Superior Court have considered it. The Court of Appeal of Ontario took the matter for granted, and then repeated a

little later that the objective of 23 is to guarantee schools that are truly of the minority, controlled by the minority, reflecting the culture and values of the minority. This is a contradiction in terms. The fact cannot be denied that it would be somewhat unfair to prohibit bilingual anglophones from having access to French-language schools, if there were no threat to the French-language nature of the school. The preservation of this basic identity is, in our opinion, part of the right to manage. The Court of Appeal of Ontario believed that such situations would not likely happen very often, and that in specific cases recourse could be had to section 24 of the Charter; we believe that this part of the judgment is in need of clarification. In our opinion, guarantees of cultural homogeneity are not compatible with the recognition of constitutional rights for individuals who are not direct participants in that culture. We shall return to this problem in our conclusion.

The court also referred to Toronto - an area where other ethnic groups and anglophones attend French immersion in large numbers. By including them, the court left the impression that immersion is covered by 23, which is contrary to our opinion and that of Richard, J. in the SANB case.

4) Effect of 23 of the Charter on denominational school rights guaranteed by section 93 of the BNA Act, 1867

There has been considerable speculation relating to the interaction of the two constitutional provisions limiting provincial power over education. The Court of Appeal of Ontario has provided a first outline of an answer that is both in line with the law and, in this case, solidly supported by the court's reasoning. At first glance, 23 does not appear to make any distinction between the two systems, and should apply to both. This suggestion is confirmed by the consistent line of cases in the Privy Council, from Mackell to Tiny, which all state unambiguously that the province is entitled to regulate education, including the language of education. The province may not prejudicially affect the separate school system, but any legislation that provides assistance to the system or does not affect its denominational nature will be valid. A fortiori, a constitutional provision dealing with language, which the courts have removed from the fields covered by 93, will be valid. Full implementation of 23 will not prejudicially affect the denominational nature of the schools nor of the separate school system. On the contrary, separate school supporters have been given an additional right: the right to receive denominational education in French or English. French-speaking Catholics will not have to choose between their language and their religious convictions.

There is very little to add to this analysis. This part of the judgment will affect all provinces where Catholic schools are protected, and the separate school system will have to adapt to the



new requirements, by offering French-language schools and classes if they do not already do so. Of course, the reverse will be true in Quebec.

The final part of the judgment considers the constitutional validity of the reforms proposed in the Ontario Ministry of Education's white paper, again in relation to the separate school system. The right of Ontario Catholics to manage their schools freely has always been considered as a fundamental component of the protection guaranteed by 93, and the court recognized it as such. Ontario wishes to impose a duty on separate school trustees to create French-language sections within their system, with trustees elected by francophones who would control the French-language schools in the system. The separate schools argued that this scheme would prejudicially affect their rights.

The court rejected this argument, stating that the structure for the management of separate schools had never been frozen in its pre-Confederation form. The decisions of the courts have protected the province's right to alter the structures and the administration of the denominational school system. Administrative autonomy is only one aspect of the denominational system, which is itself intended to preserve a religious atmosphere and promote certain values. The Ontario proposals for compliance with section 23 will not affect separate schools in any way. French-speaking Catholics were not able to rely on section 93 in order to enforce their rights, but they now have access to the protection in 23. Thus the court's judgment was internally logical: if the Ontario proposals are an acceptable scheme for implementation of 23, and if 23 applies to separate schools, then the Ontario proposals may be applied to the separate school system.

#### 5) The role of the courts

While we might have harbored great hopes that the courts would become actively involved in promoting fundamental constitutional rights, no one expected that the approach of the courts would really change in the short term. It was therefore not surprising to see that despite the generous approach taken by the Court of Appeal, it refused to make any order forcing the legislature to act on its responsibilities or make any suggestions for amending the legislation in question.

First, the court had been asked to suggest appropriate amendments to the Education Act, to comply with section 23. The court did not accept this invitation, particularly as it would not be practical or desirable in the various circumstances throughout the province. The court thus made clear its flexible approach to implementation of 23, and reiterated its opinion that provisions for the right to French-language instruction would have to be adopted to the different regions.



It is somewhat difficult to distinguish the difference the judgment finds between the content of 23 and implementation of the section. Is implementation not simply a question of the relevant conditions as set out in 23(3) - numbers, school transportation, boundaries? Or is the court saying that in some regions French immersion could replace French-language instruction? Or that in some regions an autonomus school board would be in compliance with 23(3)(b) while in others seats on an English-language school board would be sufficient?

This case demonstrates the inherent limitations of an application for a declaratory judgment. We now know that the present Education Act is inoperative; we know that criteria must be established that will comply with 23; we know that Franco-Ontarians must be able to participate in managing their schools, the process depending on the situation. But we do not know whether the procedures that the province may establish for implementation in the future will comply with 23. The court does state obiter that the proposals in the white paper appear to comply with the Charter, but in the final analysis it leaves it to the legislature to make the necessary changes. Similarly, at the end of the judgment, the court rejects the suggestion submitted by the separate schools that 23 should not be applied to the separate school system as a whole and that individual cases should be dealt with under 24(1). By stating that 23 applies to the system as a whole, the court in a sense forced the legislature to take action, or at least explicitly encouraged it to do so. On this point, the court stated:

... Legislatures are equally responsible to ensure that the rights conferred by the Charter are upheld. Legislative action in the important and complex field of education is much to be preferred to judicial intervention. Minority language rights should be established by general legislation assuring equal and just treatment to all rather than by legislation.

This approach is an attempt to reconcile the activist and conservative demands on the courts. On the one hand, the court will not hesitate to declare unconstitutional legislation to be inoperative, thereby taking a position firmly in favor of minorities. On the other hand, the court will not go so far as to propose ways of correcting unlawful situations or to suggest proposals for implementation.

The court has stated the general principles and has outlined the relevant points, and will await legislative initiatives; such initiatives will be of even greater interest, since social issues require large quantities of social and economic data that are more generally available to the legislature than to the judge. If some citizens still feel that they have been prevented from exercising their rights, only then will the courts be in a position to intervene

to deal with specific problems. This approach is quite consistent with Canadian judicial tradition, and in our opinion it is appropriate in the context of section 23. Section 23 deals with social and economic rights, which by their very nature are not good subjects for judicial intervention, requiring rather direct action by the government. For some time after section 23 first took effect we could expect that the courts would do more than provide general outlines. The legislatures will have to take a bold, imaginative and flexible approach, and in our opinion, if the schemes proposed are reasonable (as the structures put forward in the Ontario Ministry of Education's white paper appear to be) they will be upheld by the court.

### Conclusion

The main points of interest in the judgment may be summarized as follows:

- Section 23 was designed to promote national unity by entrenching an individual rather than a territorial approach, founded on the principle of bilingualism;
- history shows the mischief that 23 was intended to remedy;
- some aspects of the Education Act are inoperative:
  - basing the calculation of numbers on the language of the children;
  - applying a fixed number throughout the province without good reason in the legislation;
  - granting complete discretion to the school boards;
  - calculating the number within the boundaries of a school board.
- Since 23 is remedial, it is intended to correct one of the major sources of assimilation in Ontario: the loss of education rights. Thus it confers a right on all users of French-language educational institutions (not only French-speaking users) to participate in the management of the schools and to have exclusive power to manage all aspects of French-language instruction; the extent of such rights was not fixed, but they include hiring and assigning teachers, choosing school sites, maintaining buildings and spending funds.

- The reasons for this interpretation are:
  - the French version of 23 lends itself to this interpretation and is closer to the spirit of 23;
  - 23 was amended to expand its meaning;
  - paragraph 23(3)(b) includes more than does 23(3)(a);
  - section 27 favors this alternative, because education is closely related to culture;
  - 23 is designed to remedy an historical failing.
- The quality of French-language instruction must be equal to the quality of English-language instruction.
- Section 23 applies to separate schools because it does not in any way alter or affect the denominational nature of the system, and language of instruction is not protected by 93.
- Reform of separate school management structures does not affect denominational rights, and such reform is within provincial jurisdiction.

(b) Present situation

The action of the Court of Appeal of Ontario in invalidating a number of provisions of the Education Act has left a legal vacuum; until the required amendments are proclaimed by the Lieutenant-Governor and supplemented by the appropriate administrative guidelines, there remain many grey areas.

Two of the four questions referred to the Court of Appeal of Ontario relate directly to the proposed legislation concerning the right to minority-language instruction; the other two relate to the denominational rights of the separate schools. It was the following provisions of the Education Act that were found to be unconstitutional:

258(2) and 261(2): the principle that on written evidence of a request by French-speaking pupils in the district, the board shall determine whether the required number (25 per class for elementary, 20 for secondary) can be assembled, and shall provide for the use of French in instruction where it determines such pupils can be assembled, violates the Charter on a number of points:

an arbitrary number may not be fixed in the legislation; the school board cannot exercise absolute discretion; it appears that the requirement of a written request is contrary to section 23; the court simply stated that the number must be determined objectively; the language of the children is of no significance in determining numbers.

258(4) and 261(4): the principle that the school board may determine, in its discretion, whether the number of pupils warrants that a school be established is inoperative.

The Act confers no right to participate in managing French-language schools; as a result, the legislative provisions for advisory committees (ss. 259, 260, 267 to 274) are inadequate and the structure provided is de facto has no effect, since it is empowered only to make recommendations and implies no guarantee of participation for francophones.

In the opinion of the Court of Appeal, school boards may retain responsibility for deciding whether French-language classes or schools will be provided, and as a result it will be a simple matter to have their decisions reviewed. They should not have absolute discretion in making this decision, and the decision should not flow automatically from some magic number. There should be an objectively determined number that would be sufficient for establishment of classes or schools, and criteria for the decision should be provided.

The Education Act made the right to classes or schools conditional on evidence of a written request. Although the court did not rule on this point explicitly, its requirement that the number be determined objectively would logically mean that the right should not be conditional on a request being made.

According to the court, all children who meet the requirements of 23 must have access to French-language schools for their children. In Ontario, there are very few cases of English-speaking children attending French-language classes or schools - except immersion classes, of course. The documents that we have consulted to date do not indicate whether English-speaking children are attending French-language classes; two French-language schools, at least, appear to set aside classes where instruction is offered in English. Admission of English-speaking children to a French-language school, if it were to occur frequently and be uncontrolled, would be a problem.

The requirement that English as a second language be a compulsory course in elementary school is not contrary to the Charter (s. 258(5)).



Admission of an English-language child to a French-language school should not necessarily be subject to a vote by the admissions committee (s. 258(6)), unless the requirement set out by Chief Justice Richard in the SANB case<sup>57</sup> is to apply to Ontario, and the vote were intended to verify the child's language competence. Otherwise, subsections 23(1) and (2) confer a constitutional right to access to French-language instruction, and there can be no limitation on such a right without a constitutional amendment - except as permitted under section 1. Section 261 does not impose such a requirement at the secondary level. Either English-speaking children have full access to French-language classes, or the only children entitled to access are those who come within the criteria set out in 23, or the decision is left to the discretion of each school board.

The Education Act confers a right on members of an English-speaking minority in a region to access to instruction in English, equivalent to the right of French-speaking pupils (s. 258(8)). The problem of regional minorities is not covered by section 23, which deals only with provincial minorities. This may not be a violation of the Constitution, but a provision to advance the equality of the two official languages, as permitted by section 16(3) of the Charter.

Agreements between school boards (s. 261(5)) for instruction in the minority language were optional if the school board determined that it could not provide such instruction. Given that the school board does not now have any discretion, this provision should be replaced by a procedure setting out rules governing agreements for the construction of schools located within the two school districts, or for transportation or lodging for pupils of one school district to the institutions in another district.

#### 4. Administrative structures and related matters

The powers of the minister, as set out in section 8 of the Act, could be characterized as standard. The following are those which affect French-language education rights:

- (a) prescribe courses of study;
- (b)(i) issue curriculum guidelines and require that certain courses of study be developed;
- (ii) prescribe areas of study and require that courses of study be grouped thereunder;
- (iii) approve or permit boards to approve additional courses;
- (c) establish procedures by which books are approved;
- (d) purchase and distribute books;

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57. SANB v. Minority Language School Board No. 50 (1983), 48 NBR (2d), p. 361.

- (e) approve textbooks and reference books;
  - (f) maintain a list of approved materials (which exists in French);
  - (g),(h),(i) authorize an unqualified person to teach temporarily;
  - (j),(k) provide for teacher training;
  - (l) apportion and pay all sums received for educational purposes from the Government of Canada or any source other than an appropriation by the legislature, in accordance with the terms of the grant, if any, and otherwise in any manner he considers proper;
  - (m) permit a board to establish for English-speaking pupils, programs involving varying degrees of the use of the French language in instruction, provided that programs in which English is the language of instruction are made available to pupils whose parents desire such programs;
- this provision in effect provides for French immersion classes. The last part, however, could be interpreted as a guarantee for French-speaking pupils of access to the English-language school; since they also have access to the French-language school, they would have freedom of choice as to the language of instruction. The Act appears otherwise to be silent on this delicate question. Since the right of access to French-language schools will be conferred on those who have a constitutional right to French-language education, all other parents who wish to enrol their children in French-language schools will be subject, in doing so, to the discretion of the school boards, who are the judges on this point and who are responsible for establishing admission criteria that are not set out in the Act. An English-speaking child who was refused access to a French-language school could perhaps argue the equality rights in section 15 of the Charter, but the chances of success would be slim, in our opinion.

The minister also has regulatory powers which cover admission of pupils, equipping schools and arranging premises, certifying teachers, paying for transportation and lodging; he may prescribe the language or languages in which any subject or subjects shall be taught in any year in the schools (section 10). Regulation 80-262 (RRO, 1980) sets out the existing legislative provisions, and we shall refer to the points that concern us here.

The definitions provide that French as a second language includes programs designed for English-speaking children in which French is the language of instruction. The definition of the target population for these programs is important: in Ontario, French immersion programs are reserved for English-speaking children, and in our opinion this designation conforms to the spirit of the Charter.

Paragraph 10(d) provides that only teachers who are eligible to teach in FLIUs may hold the position of principal in schools with such modules. Sections 4 and 5 of Regulation 269 impose duties on the authorities. The teacher's certificate must indicate the language in which he or she received training, and those in charge of teacher training must certify to the deputy minister that the person is qualified to teach in French.

In addition, subsections 14(9) and (10) prohibit a teacher from teaching in French unless he or she received teacher training in French or is otherwise qualified in accordance with the regulations. Ontario has therefore ensured that teachers will have the appropriate language and teaching qualifications.

Subsections 14(1) and (3) of Regulation 262 establish mixed schools. When there are more than two French-language elementary classes, a teacher must be appointed to be responsible for the French-language program. The same rule applies at the secondary level if enrolment is between 65 and 200 pupils. If there are more than 200 pupils a vice-principal must be appointed.<sup>58</sup>

The minister must be advised of the establishment and operation of any private school, and may order that it be inspected, either on his initiative or on request; it would not appear, at least from the provisions of section 15 of the Act, that the minister has the power to approve the operation of private schools or to order that they close. Section 11 also authorizes the minister, in his capacity as the representative of the Crown in right of Ontario, to make agreements with the Crown in right of Canada respecting physical fitness, Indians, bursaries and the development of learning materials; we found nothing in the Act authorizing agreements respecting matters relating to language. The minister shall issue directives to school boards respecting procedures to be followed for closing schools;<sup>59</sup> he may also close schools himself for a temporary period.<sup>60</sup> The minister may authorize a school board to negotiate for the provision of school premises not used exclusively by the board, in certain circumstances.<sup>61</sup>

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58. Reg. 617-81.

59. Id., 8(1)(2).

60. 5(1).

61. S. 172.

An assistant deputy minister for French-language education has been appointed to manage these services. The central office of the ministry of education employs 11 permanent French-speaking staff and four seconded staff for the elementary and secondary sectors - a seemingly low number for the significant need in the province. Each ministry committee developing curriculum policy includes at least one francophone, according to the CMEC Report;<sup>62</sup> rather than create parallel structures, preference has been given to integrating the two communities. This procedure could be more attractive if there were a higher proportion of francophones. We cannot state definitively that the Charter guarantees parallel structures within the ministry of education; if, in fact, some control over management is guaranteed by subsection 23(3), such control to be implemented on the basis of conditions in the province, a claim could be made, at least on the political level, to an autonomous structure within the ministry. Manitoba has chosen to proceed in this way with the French Language Education Office, and clearly the number of French-language pupils is much lower there than in Ontario.

In addition, in 1983 the regional offices of the ministry employed, according to the report, 29 French-language educators, a number that appears much closer to the reality of language distribution in the province.

The school map is divided into school sections and divisions. The Act is difficult to follow on this point, with its numerous provisions covering districts, divisions, zones and sections for elementary, separate and secondary schools.

In general, cabinet is empowered to designate school divisions by regulation, and to dissolve school boards, combine adjoining divisions and alter the boundaries of divisions.<sup>63</sup> There is no procedure set out for exercising this power; disputes respecting the adjustment of assets and liabilities shall be referred to the Ontario Municipal Board. The school district appears to be the basic legal unit, comprising the elementary and secondary schools in the same geographic area. In each division there must be a school board established, having the status of a corporation and with all the powers and duties conferred by this Act on a public school board or secondary school board.

The Act sets out in meticulous detail the number of trustees to be elected, depending on the municipal structure of the area covered by the school division; it would be of little interest to reproduce here all the provisions based on population figures.

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62. CMEC Report.

63. S. 54(1).



The Act also creates secondary school boards with jurisdiction in any secondary school district that is not a school division; district school area boards, which are neither school sections nor school divisions, and are established by regulation, by cabinet, which may alter the boundaries of such an area; primary school districts, which may be established on provincial or federal Crown lands or other lands that are exempt from taxation (at the secondary level, these become secondary school districts).<sup>64</sup> No secondary section or district may be included in a district school area or school division.

All these designations and territorial changes appear to be left to the discretion of the Lieutenant-Governor-in-Council, who has used regulations to divide territory without stating any special procedure for territorial changes - and who need not in any event give reasons. Franco-Ontarians therefore have no recourse if they wish to have a territory redivided in their favor, and obtain their own school board; there would have to be a special regulation to accomplish this. Is this procedure contrary to the Charter? It would not appear that the Charter guarantees homogeneous school boards, at least not at this stage in the development of the case law on interpretation of section 23. If there is such a right, it could not be restricted to the occasions when the provincial executive decided in its unfettered discretion to grant it; the Act would have to provide some objective procedure for challenging territorial boundaries of school divisions if those boundaries were not compatible with the Charter.

Every school board, regardless of the type of territory in which it is established, has the same set of powers, set out in sections 149 et seq.

The duties of the school boards include the following (ss. 149 et seq.):

- provide instruction and adequate accommodation;
- keep the school buildings and premises in proper repair;
- provide the necessary textbooks and equipment.

The boards' powers are set out in section 150:

- appoint and remove teachers;
- appoint supervisors (who must be French-speaking in districts which manage French-language schools - s. 258(7));
- determine the number and kind of schools to be established and the attendance area for each school, and close schools in accordance with policies established by the board from

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64. Cf., Education Act, ss. 60, 62, 69, 70(2).

guidelines issued by the minister (this power to close schools has always been jealously guarded by the courts. It will be interesting to follow the case law on this point since the Charter has come into effect, because the discretion of the school boards must not prejudice the rights of francophones. An analogy with this reasoning can be drawn to the judicial approach to interpreting section 93 of the BNA Act, 1867, and leads us to believe that judges will seek to balance the management powers of an elected school board and the mandatory constitutional provisions);

- organize and carry on physical activities;
- provide school supplies other than textbooks;
- fix tuition fees, where required;
- provide for use of school buildings and premises.

Other sections also confer specific powers on the boards:

- 159(1) Enter into agreements with other boards to provide accommodations and equipment for instructional and administrative purposes for use by both boards;
- 160(2) Enter into agreements for one board to use another's facilities;
- 161(1) Enter into agreements for one board to furnish education for pupils of another board, upon payment of appropriate fees (used for provision of French-language instruction. However, the provision in the Act would benefit from greater precision, and in particular by imposing a definite duty in specific cases);
- 162(1) Enter into agreements between public and separate school boards for the provision of courses which are available in one jurisdiction but not in the other;
- 166(1) Provide school transportation;
- 166(7) Where a pupil resides more than 24 km from a secondary school, the board shall reimburse the parents in an amount set by the board for transportation once a week and for lodging;
- 166(12) Where a pupil resides in a zone from which daily transportation to an elementary school is impracticable due to distance or terrain, provide for the pupil as in (7);

171 Purchase or expropriate land for the construction of schools. The approval of the minister is required for site selection, specifications and alterations.

Section 235 of the Act imposes a number of duties on teachers, including specifically a duty respecting language, set out in paragraph (1)(f):

It is the duty of a teacher ...

- (f) in instruction and in all communications with the pupils in regard to discipline and the management of the school,
  - (i) to use the English language, except where it is impractical to do so by reason of the pupil not understanding English, and except in respect of instruction in a language other than English ..., or
  - (ii) to use the French language in schools or classes in which French is the language of instruction, except where it is impractical to do so by reason of the pupil not understanding French, and except in respect of instruction in a language other than French ...

This provision is similar to section 5aa in the Nova Scotia Act. It is unfortunate that this duty applies only to teachers; the schools should have the same duty in their dealings with the public or the school board.

There are a number of administrative bodies included in the overall organization of the school systems. Section 178 provides that every school board shall be assisted by an advisory committee, composed of three members of the school board, the chief education officer, six teachers employed by the board, four persons from outside the board and one representative of each of the following bodies: the Diocesan Council of the Federation of Catholic Parent-Teacher Associations, the Home and School Council (public schools only), the Fédération des Associations de Parents et Instituteurs de langue française de l'Ontario. This committee advises the school board on any educational matter, and the board must consider the opinions of the committee and may not refuse its approval without having given the committee an opportunity to be heard.<sup>65</sup>

With respect to language, although the situation may change significantly with the promised new amendments, a French-language advisory committee may be established if 10 French-speaking ratepayers of a secondary school district apply, or if a board

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65. S. 181.

establishes or extends a class, group or program in which French is used; the committee must be established within two months of the application or decision, as the case may be. This committee consists of nine members, including three members of the school board and six French-speaking ratepayers from the various territories under the school board's jurisdiction. The French-speaking members are to be elected in accordance with procedures to be adopted by the board.

Finally, in 1974 the Act established the Languages of Instruction Commission. The commission is composed of five members, including at least two from each language group. A quorum is three members, and must include at least one French-speaking and one English-speaking member; decisions are made by majority vote. The intention was that the commission would be one of the principal architects of French-language education. It receives requests for opinions from committees or groups of minority language ratepayers or the minister. The commission has the power to determine whether French-speaking or English-speaking pupils are in the minority in a school district and may even require that there be two advisory committees, one for each group. When a matter is referred to the commission, it shall appoint one or more mediators (who shall not be members of the commission) if it considers that the furtherance of such matter may be conducive to meeting the educational and cultural needs of the French-speaking or English-speaking community. The mediator shall endeavor to bring about an agreement, and shall report the agreement that has been reached or the failure to bring about agreement. If no agreement is reached, the commission shall conduct its own investigation and recommend to the board in writing a course of action. The minister and the parties are to be kept informed of the progress of the investigation. The school board shall inform the minister of its decision within 30 days of receiving the report of the commission.

So far, there is nothing more to say: this model for conflict resolution, based on the procedure used by the Human Rights Commission, has already been demonstrated to be an effective procedure for resolving disputes. However, there is a major difference between the Human Rights Commission and the Languages of Instruction Commission: the first has real coercive powers, but the second has no power at all. What happens if the school board decides not to comply with the recommendation of the commission, whether favorable to the French-speaking minority or not; or if the board decides not to act; or if the minister decides not to get involved? Nothing can be done, because the commission's powers are entirely advisory: it can only make recommendations and reports. The only decision-making body in this process is the school board, where francophones have not yet been fully accepted.<sup>66</sup> The principle of

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66. ACFO demonstrated this in the reference on the Education Act: the recommendations of the commission had generally been ignored.



the commission itself could not be challenged, although we believe that there is no guarantee in section 23 of the Charter for the existence of this commission; however, if the commission is to have a truly effective role, the legislature should provide it with more power, particularly with respect to ways of overruling recalcitrant boards. The commission's jurisdiction could also be expanded to include questions such as territory, transportation, course quality, programs and teacher language competence, so that it would be a true administrative tribunal and have effective responsibility for supervising French-language education. If this were done, the whole question would be depoliticized and greater expertise and objectivity would be ensured; a judge would only be used as a last resort, and imagination and leadership could be brought to the administrative implementation of constitutional rights.

All these administrative provisions and procedures present a somewhat rocky terrain to the observer. The Ontario Legislature appears to be hesitating between its constitutional duties and the suspicions of the English-speaking majority in the province. To review the main elements in this structure, the minister has final control over programs, and has not considered it advisable to separate the structures in the ministry along language lines, although the position of the French-language assistant deputy minister is a step forward. Section 23 could be used for a political demand for some structures in the ministry to be divided according to language, but we would hesitate to recommend a legal challenge to a procedure that falls under ministerial prerogative rather than a constitutional guarantee.

Cabinet makes regulations for the territorial division of the province, and the Act provides no procedure for citizens to initiate change. If the Charter does in fact override school boundaries and grant the right to manage schools, we believe that it would be possible to construct a solid legal argument for redrawing some boundaries in order to create linguistically homogeneous school districts where numbers warrant; after all, if Catholics have this right, it would be difficult to understand why francophones would not also have it.

It is the school boards that determine what kind of schools will be provided, and that control school openings and closings (although the minister must approve site selection and new construction). All these powers (except for school closings) are discretionary, but of course absolute discretion will not be allowed to stand against constitutional obligations. The same may be said about agreements between districts: they are now optional, but should be mandatory when numbers do not warrant establishing a school, and the Act or regulations should provide for how such agreements would operate.

The internal language of a French-language school is French, and this right should be extended to relations outside the school.

The various administrative bodies have only advisory powers, and are not management bodies that would comply with the Charter.

Any reforms to be implemented must take these various problems into account. At this point we shall quickly review the reform proposals to date, which indicate that despite some progress, a number of these problems remain.

## 5. Reforms

### (a) Proposals in the white paper of the Minister of Education of Ontario (March 23, 1983): compliance with the Charter

The ACFO judgment summarizes the Ontario government's proposals for compliance with its constitutional obligations, in twelve points. Some of these points have a direct effect on the implementation of section 23.

- 1) Remove "where numbers warrant" condition and confer the right on all Ontario residents, wherever they reside.

This proposal both complies with the minimum rights guaranteed by the Constitution and reflects the general spirit of 16(3) of the Charter. However, there is no mention of how it will be implemented. The minister (or the Act, as the case may be) would still have to establish rules for transportation of French-speaking children, the number required for a class to be opened, the option of combining different grades, site selection for schools, the territory to be served by a school, and agreements between districts; similarly, what provision will there be for closing schools and grouping pupils together? These topics are now within the discretion of the school boards, but in order to comply with the judgment, French-language sections should have the same powers. However, if the same unfettered discretion were given to the French-language boards to exercise these powers as is now held by English-language boards, the province would not automatically free itself of all constitutional responsibility. A refusal by a French-language section to open a French-language class in a particular area, and an offer to transport pupils instead may be as much a violation of 23 as would be a refusal by the English-language school board. What was disapproved by the Court of Appeal was the provision for unfettered discretion in implementing section 23 rights; while it recognized the necessity to provide for regional flexibility, it stated that there must be criteria to guide administrative decision-making.

Case-by-case considerations and unfounded refusals by whatever body would be contrary to section 23. If the province does not take action, a citizen whose rights were prejudiced would have to take his or her individual case to the courts.

- 2) Right of French-language students to the same programs and services provided to English-language students.

This point provides strict compliance with section 23, section 15 and the judgment. The Court of Appeal stated that the instruction and facilities provided for French-language pupils must be of the same quality as those provided to the majority. Mixed schools and courses taught in English in French-language instructional units, particularly at the secondary level, do not meet this requirement. It appears to us that the province is bound by this "equal quality" standard to structure two parallel homogeneous school systems. With a few exceptions, this system appears to have been implemented already.

- 3) In some jurisdictions, recognition that English is a minority language.

There is no provision for this in 23; is it in fact contrary to the Charter? There is no easy answer to this question. So long as such provisions would not prejudice the exercise of the constitutional rights of the minority-language group in the province, they would appear to be valid.

- 4) Establishment of French-language sections in some school boards.

The Court of Appeal considered obiter that this measure could provide compliance with 23; the powers of the sections would have to be defined in the legislation and would include hiring teachers, managing personnel, spending funds and establishing programs, and power over buildings and equipment. In other words, the French-language sections would have to have all powers over the schools within their jurisdiction that the school boards normally have. In our opinion, it would be doubtful that the scheme proposed would be the best or only solution.

- 5), 6) No change in Ottawa-Carleton and Metro Toronto.

There will undoubtedly have to be litigation in the near future to settle these cases. If French-language sections are created, this might be an adequate response; however, it could be argued that the number and concentration of French-language pupils would justify completely autonomous school boards in these cases.

- 7) Encouragement for separate schools to propose procedures for implementing 23.



The separate schools have no choice: they must comply with 23, and the province can impose its own model on them. In addition, their school boards could be restructured on language lines, without infringing on the right of Catholics to manage their own schools.<sup>67</sup>

- 8) Apportionment of budget on the basis of enrolment, after deduction of common expenses.

This formula might appear to comply with sections 1 and 23. However, it must not operate so as to result in any disadvantage to the French-speaking minority because of its lower enrolment, geographic fragmentation or needs for equipment. The apportionment of "public funds" should be aimed at creating equality.

Separate school boards' constitutional right to tax must not be diminished. The Court of Appeal held that the apportionment of funds would not prejudice the rights of denominational schools.

- 9), 10) Minority-language advisory committees for school boards without minority-language sections, and abolishment of such committees for other school boards.

The status of the advisory committees is unclear at this point. The Court of Appeal did recognize a right to manage, but only where numbers justify. To tie the French sections to the school boards is contrary to the principle that school boundaries would be ignored. It could be argued that numbers would always warrant creating a French-language section, whose territory would not necessarily correspond directly to the territory of the neighboring school boards. There would no longer be any justification for advisory committees. However, it might be more efficient, from an administrative point of view, to create such a committee in a school district where there is only one or two French-language classes, rather than having those classes be managed by the French-language section of a distant school board. Is it preferable under the Constitution to have a French-language class managed rationally by a body with no decision-making power, or to guarantee the full right to manage the schools? We have no answer to this question; everything will depend on individual situations. We are prepared to believe that homogeneous French-language school boards would be preferable to advisory committees, even if there must be school boards for a smaller number of pupils or the territorial jurisdiction of the school boards would have to be larger.

- 11) A right of appeal to the minister from a rejection by the school board of a recommendation of the Languages of Instruction Commission.

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67. P. Hogg, supra, footnote 50.



This recommendation, and the provision for the commission itself, do not relate to 23. The commission can become one of the structures for implementing the rights guaranteed in 23, if its powers are augmented.

- 12) Government review of enumeration for school board election purposes.

Attention will have to be paid to this recommendation, which must be implemented to provide for the election of trustees in the French-language sections. The court stated that all users of the French-language system are entitled to participate in it, including all children of parents who qualify under 23(1) and (2), and anyone else who has access to such facilities by virtue of any guidelines adopted by the school boards, which retain their discretion in this matter, subject to the vote of the admissions committee established by the Education Act.

(b) Bill 119, June 1984

In response to the judgment of the Court of Appeal, a Bill was tabled in the legislature. Included in the proposed amendments were some that were proposed to comply with the judgment of the court.

These sections are as follows:

258(1) In this section,

- (a) "board" means a board of education, public school board or separate school board;
  - (b) "French-language instructional unit" means a class, group of classes or school in which French is the language of instruction;
  - (c) "French-speaking persons" means a child of a person who has the right under section 23 of the Canadian Charter of Rights and Freedoms to have his children receive primary and secondary school instruction in the French language in Ontario.
- (2) Every French-speaking person who is qualified under this Act to be a resident pupil of a board has the right to receive elementary school instruction in a French-language instructional unit operated or provided by the board.
  - (3) Every board that has one or more resident pupils who exercise their right to receive instruction in a French-language instructional unit shall establish and operate one or more French-language instructional units for

those pupils or shall enter into an agreement with another board to enable those pupils to receive instruction in a French-language instructional unit operated by the other board.

- (4) A board that provides a French-language instructional unit for elementary school instruction by means of an agreement with another board shall provide to each French-speaking resident pupil of the first-mentioned board who is a pupil in the French-language instructional unit and resides with the parent or other person who has lawful custody of the pupil more than twenty-four kilometres from the French-language instructional unit,
  - a) an allowance payable monthly in an amount set by the board for meals and lodging for each day of attendance as certified by the principal in respect of the French-language instructional unit and for transportation once a week from the pupil's residence to the lodging and return; or
  - b) daily transportation from the pupil's residence to the French-language instructional unit and return, where the parent or other person who has lawful custody of the pupil elects to have daily transportation.
- (5) English may be a subject of instruction in any grade in a French-language instructional unit mentioned in subsection (2).
- (6) English shall be a subject of instruction in grades 5, 6, 7 and 8 in every French-language instructional unit.
- (6a) A board, on the request of the parent of a pupil of the board who is not a French-speaking person, or of a person who has lawful custody of a pupil of the board who is not a French-speaking person, may admit the pupil to a French-language instructional unit if the admission is approved by majority vote of an admissions committee appointed by the board and composed of the principal of the school to which admission is requested, a teacher who uses the French-language in instruction in the school and a French-speaking supervisory officer employed by the board or arranged for in accordance with subsection (7).
- (7) Where a board does not employ a French-speaking supervisory officer, it shall arrange for a French-speaking supervisory officer employed by another board or by the minister to serve as a member of the admissions committee.

- (8) Where a board provides one or more French-language elementary schools, a resident pupil of the board has the right to receive instruction in the English language and subsections (2), (3) and (4) apply with necessary modifications in respect of the resident pupil and the board.

260(ca) "French-speaking person" means a child of a person who has the right under section 23 of the Canadian Charter of Rights and Freedoms to have his children receive primary and secondary school instruction in the French language in Ontario.

261(1) Every French-speaking person who is qualified under this Act to be a resident pupil of a board has the right to receive secondary school instruction in a French-language instructional unit operated or provided by the board.

- (2) Every board that has one or more resident pupils who exercise their right to receive instruction in a French-language instructional unit shall establish and operate one or more French-language instructional units for those pupils or shall enter into an agreement with another board to enable those pupils to receive instruction in a French-language instructional unit operated by the other board.

- (3) A board that provides a French-language instructional unit for secondary school instruction by means of an agreement with another board shall provide to each French-speaking resident pupil of the first-mentioned board who is a pupil in the French-language instructional unit and resides with the parent or other person who has lawful custody of the pupil more than twenty-four kilometres from the French-language instructional unit:

- a) an allowance payable monthly in an amount set by the board for meals and lodging for each day of attendance as certified by the principal in respect of the French-language instructional unit and for transportation once a week from the pupil's residence to the lodging and return; or
- b) daily transportation from the pupil's residence to the French-language instructional unit and return, where the parent or other person who has lawful custody of the pupil elects to have daily transportation.

Rather than go over all these provisions again, we will make the following comments:

- Definitions: 258(1)

- (a) school boards include separate school boards: this complies with the judgment;
- (b) FLIUs are units in which French is the language of instruction: this definition does not appear to include immersion, and thus complies with 23, in our opinion;
- (c) the definition of persons entitled to the right refers explicitly to 23. The expression "parent" is singular: only one parent needs to qualify. The reference to "school instruction in the French language" appears to exclude immersion. The reference to Ontario complies with the reference in 23 to the province.

- The right: 258(2)

The right is granted to anyone entitled to it who meets the residence requirements in a school district, as defined in the Act. Such person has a right to receive instruction in French in a FLIU (class, group of classes, school) operated or provided by the school board. The numbers requirement is removed, but school boundaries are retained, and could still be challenged.

- Exercising the right

Any board where one or more persons exercise their right shall establish and operate one or more FLIUs for those pupils (thus, apparently, other pupils would be excluded) or shall enter into an agreement with another school board to enable those pupils to receive instruction in French with that board.

This provision appears to comply with the Charter. It remains to be decided at what point, or on what basis, a school board may choose between establishing a FLIU and transporting pupils.

- Transportation

If there is an agreement, the school board shall provide an allowance for transportation, meals and lodging, or for daily transportation if the parents so choose. The Act does not say whether these allowances shall be uniform, or whether they must cover all expenses incurred. The choice between lodging and



transportation is left to the parents, which is appropriate. This provision applies to all pupils who live more than 24 km from the FLIU - a possibly arbitrary figure, which might be challenged.

- Instruction in English as a second language is optional until grade 4 and mandatory from grade 5 onward. Nothing more needs to be said on this point.

Subsection (6a) replaces subsection (6). It confirms our opinion on the vote of the admissions committee: a vote can only be held on applications by persons who are not entitled under 23 or by adults who do not meet the criteria in 23. However, there are no defined criteria to be followed by the admissions committees. Will they consider the child's language capacity? The child's residence?

Subsection (8) grants to English-speaking persons who reside in a school district where the board provides one or more French-language schools the same rights as have French-speaking persons. Our earlier remarks on this situation would apply here.

Section 261 repeats the provisions in section 258 for secondary schools, except that there is no equivalent right granted to English-speaking persons and there is no vote by the admissions committee. If these two provisions are not applied to the secondary system, we might wonder what use they are at the elementary level. This omission in section 261 could also indicate the intent of the legislature, which was perhaps deliberately silent, to limit the extension of access to French-speaking schools to the elementary system only.

(c) Bill 160

1) Context

Paragraph 23(3)(b) of the Charter provides that the right to French-language educational facilities must be accompanied by the right to exclusive management of such facilities.

On the basis of the ACFO case, this right to management must be taken to include both instruction and the cultural aspects of the school. The proposals in the white paper might be acceptable. Section 23 applies equally to separate schools.

Since the amendments of June 1984:

- eligible pupils are those whose parents meet the criteria in section 23 of the Charter. Other pupils are subject to consideration by an admissions committee at the school;

- the minimum number is one pupil;
- if the school board cannot provide a FLIU it must enter into an agreement with another school board and pay for either daily transportation or lodging.

The white paper of March 23, 1983, also provides for the creation of French-language (or English-language) sections within the school boards, a budget to be allocated on the basis of enrolment, and no change for Ottawa-Carleton and Metro Toronto.

What is the constitutional validity of the Bill presented in the legislature?

The Bill seems on its face to comply with 23; the restrictions it contains may be seen as "reasonable limits." However, we would prefer to see completely homogeneous school boards. In practice, the system will be difficult to manage.

## 2) Outline of the Bill

### 2.1) Definition: 277c

(d) French-language: resident pupil enrolled in a school or class under Part XI;

(e) full-time equivalent enrolment, in relation to resident pupils: FTE;

- the number of French-language (supra) resident pupils, or
- the number of resident pupils other than French-language, calculated by the Ministry

represented by the number of resident pupils in the report of enrolment and attendance filed with the ministry by the board;

(f) resident pupil

- pupil registered on a register prescribed by the minister, who

(i) is qualified to be a resident and is enrolled in a school

(A) operated by the board,

(B) operated by another board to which the board pays fees,

(C) operated by another board than the board of which the pupil is qualified for residence, in Metro Toronto.

- (ii) is not qualified to be a resident but is enrolled in a school operated by the board
  - (A) pursuant to section 45 (children's aid),
  - (B) where fees are required to be paid under the Act other than by another board, notwithstanding that the payment of all or a part of the fees is waived by the board that operates the school;
- (g) total full-time equivalent enrolment, in relation to resident pupils of a board
  - total number of full-time pupils of the board calculated by the Ministry;
  - represented by the number of resident pupils in the report of enrolment and attendance filed with the Ministry by the Board.

Order: 1st: resident  
2nd: French-language resident  
3rd: French-language FTE or English-language FTE, resident  
4th: total FTE.

2.2) Right to additional membership and calculation - appeals - exemptions - elections

2.2.1) Right

277d (1) membership of a board that has the enrolment of resident pupils specified in (2) shall be increased by the number of additional members specified in (3)

2.2.2) Calculation

(i) Criterion

- (2) enrolment of resident pupils: FTE of French-language resident pupils where
  - (a) French-language FTE is a minority of total FTE of resident pupils of the board,
  - (b) French-language FTE;
    - (i) is equal to or greater than 10% of total FTE, or
    - (ii) amounts to 500 or more resident pupils;
- (3) calculation of number of members:
  - 1. Determine number of regular members
  - 2. Multiply by FTE of French-language resident pupils
  - 3. Divide by FTE of resident pupils other than French-language;

- (4) if the number is less than 3, increase to 3  
more than 7, reduce to 7;
- (5) if the number of trustees is 14 or more and conditions in  
(2)(b)(i) or (ii) are met
  - if the number is less than 5, increase to 5  
more than 7, reduce to 7.

(ii) Calculation of enrolment

277f every board shall file with the Ministry on the prescribed form a report of enrolment and attendance of resident pupils

- in classes and schools operated under Part XI
- in classes and schools not operated under Part XI

as of September 30th in each year.

- 277g (1) the Ministry shall then calculate itself
- FTE of French-language resident pupils
  - FTE of other resident pupils
  - total FTE of all resident pupils;
- (2) the Ministry shall then calculate the number of additional members;
- (5) before September 1st the Minister shall
- (a) notify the school board of the calculations under (1) and (2)
  - (b) notify the returning officer
  - (c) give public notice that the board qualifies under this part and of the number of additional members to be elected.

2.2.3) Appeals

- 277g (6) - by the board, the Commission or a committee
- to the Minister
- (7) - who shall appoint a reporter; the Minister shall make the changes recommended in the report
- (8) the Minister shall
- (a) notify the board of any changes
  - (b) notify the returning officer
  - (c) give public notice.

2.2.4) Decreases in enrolment



- 277h where a board has additional members but the FTE of French-language resident pupils falls below the enrolment required to qualify  
- only 2 members shall be elected at the next election.

2.2.5) Exemption from additional members

- 277i (1) by order of the Minister in the circumstances described  
(2) circumstances:  
- the FTE of French-language resident pupils is less than 200 or less than 4% of total FTE  
(3) the board shall establish an advisory committee  
(4) a public notice by the Minister that the board qualifies to have additional members operates to rescind the order.

2.3) Elections

- (i) qualifications to be a member

- 277e (1) a member of a board of education:  
(a) qualified under 196(1)  
(b) not disqualified  
(c) who is an elector or separate school elector  
(d) is entitled to have his or her children receive instruction in French under 23(1) or (2);  
(2) a member of a board other than a board of education:  
(a) qualified under 196(1)  
(b) not disqualified under 196(3)  
(c) separate school elector  
(d) is entitled under 23(1) or (2);

- (ii) qualifications to be an elector

- 277j (1) (a) qualifies to vote in a regular election of the board,  
and  
(b) chooses to vote only for an additional member  
(2) no one may vote for both a regular member and an additional member;

- (iii) elections

- 277k (1) the additional members shall be elected by general vote of the persons qualified to vote for additional members  
(2) the election shall be held at the same time and in the same manner as the election of the other members of the board;

(iv) vacancies

2771 (1) if the remaining additional members are a majority of the required additional members, they shall appoint a qualified replacement

(2) where there is no majority, an election shall be held

(3) the term of the new member shall be the remainder of the original term of office

277m 2.4) Powers:

(i) matters within the exclusive jurisdiction of the additional members

- The planning and establishment of FLIUs under Part XI, including the submission of capital expenditure forecasts to the board for submission to the Ministry
- The administration and closing of FLIUs
- The planning, establishment, implementation and maintenance of programs for pupils enrolled in schools and classes under Part XI or evening classes where French is the language of instruction (other than religious education)
- The recruitment and assignment of teachers and administrative and supervisory personnel for schools and classes under Part XI
- Entering into agreements under section 159 (provision of accommodation or services to another board), 161 (furnishing or obtaining education for pupils) or 165a (adult basic education) in respect of pupils in schools or classes under Part XI;

(ii) matters outside the jurisdiction of the additional members

- The planning and establishment of public schools, other than under Part XI
- The administration and closing of public schools, other than under Part XI
- The planning, establishment, implementation and maintenance of programs for pupils enrolled in schools not under Part XI
- The recruitment and assignment of teachers and administrative and supervisory personnel for public schools and evening classes referred to in paragraph 3
- The planning and establishment of secondary schools other than under Part XI
- The administration and closing of secondary schools other than under Part XI

- The planning, establishment, implementation and maintenance of programs for secondary schools that are not under Part XI
- The recruitment and assignment of teachers and administrative and supervisory personnel for secondary schools not under Part XI
- Agreements under 159, 161, 163 (secondary education) or 165a for pupils other than pupils in schools or classes under Part XI;

(iii) other matters: same duties and responsibilities, same powers and rights

277n 2.5) Allocation of funds:

- (3) After the estimates of a board are approved or adopted, as the case requires, the board shall allocate the amounts of its estimated revenues as follow:
  - to the specific programs, schools or classes that generated a portion of the estimated revenues, in amounts equal to the amounts generated
  - to the centralized services of the board, in amounts equal to the amounts set out for the centralized services in the estimates
  - to the schools and classes under Part XI and to the balance of the schools and classes not under Part XI
- (4) The board shall allocate the revenues under (3)(3) to the schools and classes under Part XI in the ratio that the average daily enrolment in those schools and classes is to the average daily enrolment of the board in all schools and classes mentioned in (3)(3)
- (5) The board shall allocate the revenues under (3)(3) to the balance of the schools and classes not under Part XI in the ratio that the average daily enrolment in those schools and classes is to the average daily enrolment of the board in all schools and classes mentioned in (3)(3)
- (6) Where all of the balance of the schools and classes are provided by the board under Part XI, the board shall allocate the estimated revenues under (3)(3):
  - (a) to the schools and classes in which French is the language of instruction, in the ratio that the average daily enrolment in those schools and classes is to the average daily enrolment of the board in all schools and classes mentioned in (3)(3)

- (b) to the schools and classes in which French is not the language of instruction, in the ratio that the average daily enrolment in those schools and classes is to the average daily enrolment of the board in all schools and classes mentioned in (3)(3)

(7) Centralized services mean:

- (a) salaries, benefits and professional development of employees other than those whose recruitment is specified in this Part
- (b) normal maintenance of and operational services and equipment required for school sites
- (c) school supplies other than instructional and learning materials
- (d) transportation to and from school and from school to school
- (e) allocation to reserve funds and the reserve for working funds
- (f) establishment and maintenance of the head office of the board, including services operated therefrom
- (g) permanent improvements other than the replacement of furniture, library books, instructional equipment
- (h) expenditures that are not within clauses (a) to (g) but that are approved from time to time by the board.

277o 2.6) Duties of the school board:

- (1) Every board shall ensure that the matters that are within its exclusive jurisdiction and the matters that are outside the jurisdiction of the additional members are properly provided for when the board prepares and adopts its estimates and when the board allocates its estimated revenues.
- (2) Subsection (1) applies to the Metro Toronto School Board in the allocation of amounts to the boards of education within the Metropolitan Area under the Municipality of Metropolitan Toronto Act.
- (3) Subject to subsection 1, a board may modify an allocation in order to accommodate a change in circumstances or assumptions upon which the estimates were made.

277p 2.7) Administrative matters:

- 277p The chief executive officer of a board shall report to the additional members of the board in respect of the matters that are within their exclusive jurisdiction



- 277q (1) Two or more boards, upon the request of the additional members of the boards, may establish a liaison committee
- (2) A liaison committee may consider and make recommendations to the additional members of a board on any matter that the board agrees may be referred to the liaison committee
- 277r (1) A board that has additional members shall not have an advisory committee under Part XI.
- (2) Where the membership of a board that has an advisory committee is increased by the election of additional members the advisory committee is dissolved

277s Minority English-language pupils: (2) applies where:

- (a) the FTE of non-French-language resident pupils is a minority of the total FTE of the resident pupils of the board, and
  - (b) the FTE of non-French-language resident pupils
    - (i) is equal to or greater than 10% of the total FTE of resident pupils, or
    - (ii) amounts to 500 or more resident pupils
- (1) interpretation
- This part applies in respect of schools and classes under Part XI in which English is the language of instruction, and for these purposes
- (a) a reference in this Part to French shall be deemed to be a reference to English
  - (b) a reference to a person who has a right under 23(1) or (2) of the Charter shall be deemed to be a reference to a person who does not have such a right

277t The Minister may prescribe and require the use of:

- (a) forms of registers of FTE and PTE
- (b) the form of the report of enrolment and attendance

277u An act of the Minister under section 277t or an order or notice of the Minister under this Part, other than

- a public notice under section 277g
- an exemption order under 277i

is not a regulation within the meaning of the Regulation Act.

### 3) Major aspects of the Bill

All French-speaking persons who qualify under 23 are included.

Pupils resident in another board district for whom the board of residence pays fees are included as residents; also included are pupils in schools within the board's territory for which fees are paid other than to a board; in Metro Toronto, pupils are included if they attend a school of a board other than where the pupil is resident.

Level at which additional members are obtained:

- when the FTE of resident French-language pupils is a minority and accounts for (1) 500 pupils or more, or (2) 10% or more of the total FTE;
- FTE of resident French-language pupils is 200 to 500: two additional members;
- FTE of resident French-language pupils is less than 200, or less than 4% of the total FTE, the board keeps its advisory committee.

Calculation of additional members:

- (number of regular members x FTE of resident French-language pupils) divided FTE of resident non-French-language pupils;
- minimum of three members, maximum of seven;
- from five to seven members if the board has 14 or more members and FTE of resident French-language pupils is 500 or more or accounts for 10% or more of total FTE.

Method of calculating:

- the board provides a statement on forms prescribed by the minister of enrolment and attendance for resident French-language and non-French-language pupils, i.e. pupils enrolled in classes or schools under Part XI and classes and schools not under Part XI;
- the ministry calculates the FTE of resident French-language and non-French-language pupils and total FTE, and the number of additional members. It notifies the board, the returning officer and the public. An appeal may be made to the minister; the minister must follow the recommendations of the reporter appointed by him.

Elections:

- qualifications of additional member: ordinary qualifications + right under Charter;
- qualifications of elector: ordinary + choice to vote for additional member;
- election in normal manner.

Powers:

- exclusive: management of FLIUs under Part XI - full rights including teachers, schools and programs;
- withdrawn: management of English-language public schools;
- joint: other powers of a board.

Allocation of funds and approval of estimates:

- programs, schools and classes that have generated revenues, up to the amount of such revenues;

- centralized services of the board (employees other than those under the jurisdiction of the sections, school maintenance, equipment other than learning material, transportation, other items approved by board);
- balance allocated to sections, on the basis of average daily enrolment in schools and classes of the section as a proportion of total average daily enrolment of the board.

#### 4. Constitutional validity of the Bill

At first glance, and considered objectively, this Bill may appear to be a reasonable attempt on the part of the legislature to implement section 23 in the demographic context of Ontario. However, if we examine it more closely, and apply it to the fact situation, we will begin to wonder whether the Bill is really an appropriate response. It may be, though, that Franco-Ontarians will prefer for strategic reasons that the Bill be passed, despite the fact that it is incomplete, rather than have the legal vacuum that has existed in Ontario since the judgment of the Court of Appeal.

The aspects of the Bill that appear objectively to be open to challenge may be described as follows:

- Joint management

If the Court of Appeal of Ontario did recognize that the minority has a right to autonomous management of its schools, the validity of these provisions for some items to be managed jointly may be doubtful. These items cover those elements of management that Franco-Ontarians will never be able to hope to control, because of their minority status.

- Proportional representation

The Bill is intended to implement the concept of proportional representation. The methods provided for calculating numbers may in fact fail to accomplish this, particularly when applied to the separate schools. The concept of proportionality is not itself clearly defined: is it intended that representation will reflect proportions in the population, or proportions of attendance? In Greater Hull School Board<sup>68</sup> the Supreme Court favored the second approach, but avoided dealing with it, instead stating that there was a right to allocation of funds between the public and separate schools which would take proportions into account.

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68. (1985), 15 DLR (4th), p. 651 (SCC).

Bill 160 has opted for proportional representation on the basis of attendance, but the calculation method could betray the principle. First, the calculation is done on the basis of the existing number of school board members; because of demographic factors, there could be a majority of French-language members, as often happens in the separate school boards.

When the French-speaking minority in the region is in a majority on the separate school boards, English-speaking residents will have a right to additional members. The definition of "minority" remains a major problem.

While the concept of proportional representation is based on a valid intention, it may create unintended results. The maximum number of seven does not establish a balance when there are more than 14 members of the school board, none of whom are French-speaking: even with seven additional members, we cannot expect parity with 16 or 18 English-speaking members, for example, even though the FTE of French-speaking pupils may amount to 40% of the total FTE. For example:

16 board members, all English-speaking but one  
English-speaking FTE: 6000 (60%)  
French-speaking FTE: 4000 (40%)  
Number of additional members:  
(16 x 4000) divided by 6000 = 10.2; this must be reduced to seven, for a total of eight French-speaking members out of 23, or 30%, while enrolment is 40% French-speaking

On the other hand, in some boards, whether separate or public, there may be a situation in which English-speaking electors will be over-represented and will control the board:

16 board members, of which six are English- and 10  
French-speaking English-speaking FTE: 4000 (40%)  
French-speaking FTE: 6000 (60%)

Additional English-speaking members (since they are the minority): (16 x 4000) divided by 6000 = 10.2, reduced to seven. There will then be 13 English-speaking members on a board of 23, or 60%, while enrolment is only 40% English-speaking. This is not a proper way to protect the French-speaking minority - to place them in a minority position on the board (13 English-speaking members to 10 French-speaking members) when they have a majority of the students, are in a minority in the city, and had the majority on the board. The spirit of section 23, if not the letter, is violated.



Thus it appears that there is still major work to be done in this respect, since the formula could produce unanticipated and possibly unconstitutional results.

(c) Minimum number of 500 and concept of minority

The Bill reiterates one of the mischiefs found by the court in the earlier situation: the requirement of a number to be found within the territorial boundaries of the system. Before it can request additional members, the school board must justify its claim that there is a minority of 10% of the **school** population or of 500 pupils. Where did this number come from? How can it be justified? Why is the requirement fixed at 500, but then permitted to decrease to 200 or 4% and two additional members still be retained? Was this intended to show that 200 is an acceptable minimum? If that is so, the threshold figure of 500 cannot be defended; it should be fixed at 200. It should also be recalled that the regulations require that there be a teacher who is responsible for a French-language program if there are 65 pupils.

The question of school district boundaries also presents a number of problems. If it could be demonstrated that the required number of pupils could be found if school boundaries were ignored, that number would have to be considered. Paragraph 23(3)(b) establishes a numbers criterion, but it appears to relate more to financing than to territory: when numbers warrant, there will be facilities financed out of public funds. Thus a requirement of 200 pupils to show that a school would be viable could be justified on the basis of administrative constraints, but in that case the pupils would have to be recruited where they reside, and not necessarily in the jurisdiction of a school board where the school is to be located. The latter procedure could be applied, but never so as to prejudice the rights guaranteed in the Constitution.

This leads us to the definition of a minority. The early versions of the Charter referred to a regional minority; this definition changed, and today it refers to protection of the rights of a minority of a province. The Bill adopts the criterion of a minority within a school board. When the French-speaking community happens to be in the minority in the schools, the Bill's merits are clear, but when francophones are in the majority the Bill changes the nature of the protection granted to minorities by section 23, as we saw supra. This effect is even more prejudicial when a French-speaking majority exists on a school board in an area where francophones are in a minority overall (as is the case in the Ottawa region where the French-speaking minority is concentrated in the separate schools). In that case, the minority status in the social environment, balanced by a concentration on the board, will be exacerbated by the loss of majority status on the school board. How can we talk about protecting francophones when they will lose the few places where they have been able to obtain power?

The minority status requirement should therefore be removed, and the entire system should be reworked so as to develop new requirements that would guarantee real autonomous management rights for Franco-Ontarians in their institutions, whether they be a minority or a majority in any individual situation.

(d) Formula for calculating funding

The allocation of funds is based on an objective criterion: attendance, which the Supreme Court considered sympathetically. Franco-Ontarians, however, have a number of objections to this criterion. First, budget estimates are fixed by the school board in its discretion, and while the board must consider the provisions in the Act, there is nothing to circumscribe its obligations in doing so. In addition, French-language instruction may require greater investment than the normal costs, and allocations on the basis of attendance do not reflect these additional costs. We believe, however, that the calculation method might be viewed sympathetically by the courts, which prefer objective criteria to discretionary methods. Any challenge to this method should take care to demonstrate that it is unfair and inequitable, and would therefore require the assistance of experts in education and of specialists in this field.

(e) The right to vote

Access to FLIUs should be limited to those children whose parents qualify under 23; other children should be required to be tested by the admissions committee. The June 1984 amendments provide for this to be done. Positions for additional members are reserved to those who qualify under 23. No conditions are applied to regular members. A powerful lobby could succeed in ensuring that there were a sufficient number of members of its own language in the ordinary seats, and then also use the additional member mechanism to take control of the board (a possibility that was raised by a number of people in private conversations). The right to vote itself depends on the parents' choice. They do not have to vote in the language system their children attend, although the intention of the legislature was undoubtedly that they would do so spontaneously. However, francophones with children attending French-language schools could vote for a regular member, while anglophones could choose to vote for additional members. The administrative and political confusion that could result may be imagined.

In Greater Hull School Board, the Supreme Court found it an easy matter to agree that the right to vote should be tied to the jurisdiction of the board member: with respect to referenda, electors may vote only on proposals presented by **their** denominational school board, and any provision that grants a right to vote to all electors in the school territory of the municipality without distinction is

contrary to section 93 of the BNA Act, 1867. This statement of principle must be applied here, with the necessary changes, and the right to vote should be tied to an objective requirement (attendance in a FLIU, for example) rather than left to the parent to choose.

Overall, the Bill leaves the impression of being a compromise which will present numerous difficulties in application. It may appear on its face to be valid and objective, subject to certain objections that may be made, but its effects are potentially unconstitutional.

### Conclusion

It is difficult in the context of this study to arrive at a clear evaluation of the Ontario situation, which will have to be changed in the very near future. We shall therefore review the general outline of this system, which is one of the most complex in Canada.

First, it can be stated that the denominational school system in Ontario is well established and protected. There is little danger that these schools will disappear, and the new guarantee of full government funding for the system supports this view. Since the guarantees of language rights will apply to the separate school system, we will have to observe the new government proposals to see that they respect the rights guaranteed in section 93 of the BNA Act, 1867; given the opinion of the Court of Appeal of Ontario, it would appear that the province can take quite far-reaching measures without infringing on this right.

At the administrative level, although the Court of Appeal considered that the proposals in the white paper complied with section 23 at first glance, a number of aspects of these proposals remain that require further thought, including, at the very outset, the procedure for deciding whether to open a French-language class or school, and the entire apparatus that flows from this decision, including transportation, lodging, distance, location of new facilities, conditions of admission, and so on. It would be preferable, and legally more compatible with the spirit of section 23 of the Charter, to create a procedure similar to that used for creating separate schools, for example, or a system similar to the one used in New Brunswick.

A number of other current and proposed provisions are also inadequate, because of the discretionary powers that remain uncircumscribed by the Act and the inadequacy of the reform measures.

We are thinking here of the following factors, that have been referred to in this study:

- the admission to French-language schools of pupils whose parents do not meet the conditions set out in section 23;
- the absence of any procedure for altering school boundaries and the centralized nature of the process;
- the inadequacy of the powers of advisory committees and the Languages of Instruction Commission;
- the inadequacy of the internal structures of the ministry, in spite of efforts to date;
- the inadequacy of the minority-language sections and the status of the English-speaking minority;
- in general, the absence of any criteria in the legislation to ensure that there will be concrete decision-making power as required by the Constitution.

It would be difficult to go further than this. The vague nature of the Ontario legislation will eventually force a case-by-case consideration by the courts. In our opinion, this reform exercise does not fully meet the needs of Franco-Ontarians or comply with the requirements of section 23 of the Charter, and we will have to wait for further challenges in the courts or legislative amendments.





**VII. French-Language Educational Rights  
in Manitoba**



In 1670, King Charles II of England granted all of the Canadian northwest to the Hudson Bay Company by Royal Charter. In 1730, De La Vérendrye claimed the same territory in the name of the King of France. But the first stable colony was not established until about 1800, under the influence of Lord Selkirk. The first French school, operated by the Catholic church, was opened in St. Boniface in 1818, and two years later, in 1820, a Protestant school was founded on the other side of the river.<sup>1</sup> When negotiations were undertaken for the province to enter Canada, as happened in the other colonies, constitutional entrenchment of guarantees of protection for the denominational nature of the schools, as reflected in the actual situation at the time, was considered adequate to ensure the survival of the language. For this reason, section 22 of the Manitoba Act incorporates the terms of section 93 of the Constitution Act, 1867, with the addition of recognition of rights enjoyed by practice as well as by law - a reasonable addition since before 1870 there had been no constitutional government with the legal power to enact laws.<sup>2</sup>

History was eventually to demonstrate that section 22 of the Manitoba Act would not be able to preserve denominational schools or the language of instruction, as we shall see here. Having gone through a number of difficult times, Franco-Manitobans have seen some improvement in the school system, but further progress is necessary if the system is to comply with the Charter.

#### 1. Fact situation

The CMEC Report does not give a very clear picture of the situation in Manitoba. It indicates that "21 of the 48 school boards in Manitoba operate schools which offer both French- and English-language education." There are nine homogeneous elementary schools and 32 bilingual mixed elementary schools, where instruction is provided in both languages; this makes a total of 41 elementary schools out of 484, or slightly less than 10%, which is in line with the demographic makeup of the province. At the secondary level, there are four homogeneous schools and 13 mixed schools, for a total of 17 of the 149 secondary schools. To these must be added the four schools out of 151 which combine elementary and secondary levels, where mixed instruction is offered. This makes a grand total of 63 homogeneous and mixed schools; the report, however, indicates that there were 80 schools "in which the language of instruction is French

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1. Robert, Gill Federal, provincial and local language in Manitoba and the Franco-Manitobans, 6th biennial conference of the Canadian Studies Association in the U.S., East Lansing, Michigan, October 22-24, 1981, p. 30.
  2. Oliver, The Canadian North-West: its early development and legislative records, publication of the Canadian Archives, No. 9, Ottawa, 1914-1915, vol. 1, p. 352.



or which have adopted development plans toward this end".<sup>3</sup> Special funding is available to assist school boards wishing to establish programs in which instruction is provided entirely in French. It is noted that the proportion of instruction time in French decreases with each increase in grade level. Most of the programs are not offered entirely in French.

Franco-Manitobans have not enjoyed denominational education privileges; they have been at the mercy of the majority and of circumstances. The present situation, which is seemingly inadequate, reflects this historical situation.

## 2. Denominational schools

When Manitoba was created in 1870, there was a desire to provide greater protection for the Catholic church than Catholics in other provinces of the still young Confederation had obtained. It should be remembered that the French Catholic population of Manitoba was then almost equal to the English Protestant population, and that guarantees for denominational schools were the absolute minimum the Catholics would accept as a condition of joining the new federation. Section 22 of the Manitoba Act<sup>4</sup> gave the province exclusive jurisdiction over education, subject to the denominational education rights enjoyed by citizens in the province at the time of the Union, by practice or by law: "Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or **practice** in the Province at the Union ... " (emphasis added). It was believed that the addition of the word "practice" would correct the problems in section 93 of the Constitution Act, 1867, which protected only **rights**. However, the interpretation applied by the courts would soon show that this addition did not succeed in its aim. Before 1890, Catholic schools were part of the private school system. Before Union, this situation was normal: there was no constitutional government or legislation to administer the territory belonging to the Hudson Bay Company, and so there were no public schools. Testifying at the trial in the Barrett case,<sup>5</sup> Mgr. Taché, Archbishop of St. Boniface, explained that each denomination financed its own school system, in part by fees charged to the parents and in part with funding from the churches themselves. Catholics had no right to attend Protestant schools, and vice versa: there was complete separation of the two systems, similar to the situation we have seen in Quebec and Ontario.

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3. P. 78.

4. (1870), 33 Vict., c. 3.

5. City of Winnipeg v. Barrett, [1892] AC, p. 445.

The first school legislation was enacted in 1871.<sup>6</sup> The province established a board of education, divided into Catholic and Protestant sections. The school districts corresponded at that time to the electoral districts; 12, or exactly half, were considered to be Catholic. Base funding was provided by the province, and the school trustees were empowered to raise additional funds by property taxes, among other methods. The Act granted no right to dissidence or to exemption, but it permitted a taxpayer who did not want to support the denominational schools in his district to send his or her children to school in the closest district belonging to his denomination and to pay taxes there. Transportation and housing, however, were not paid for by the school trustees. In 1881, Catholics and Protestants were permitted to share the same geographical district without having to support the schools of the other denomination.<sup>7</sup> In 1871, complete separation of the denominational systems was established by law, and taxpayers affiliated with one system were given immunity from the taxes levied by the other system.

However in 1890, as we know, the Manitoba government decided to abolish the denominational system and establish a single English system, over the loud protests of the province's Catholics.

Two pieces of legislation were enacted. The first established a provincial department of education and an advisory board, on which Catholics were not entitled to have any representatives; the second, which is the one with which we are concerned here, is the Public Schools Act.<sup>8</sup> Section 7 of the Act gave the trustees the discretion as to whether they would authorize religious exercises in the schools of their district; section 8 stated that the public schools were non-sectarian, and that no religious exercises other than those prescribed would be authorized. School funding was provided by grants, although local taxing power was preserved. However, any school which did not comply with the Act or Regulations was not entitled to public financing: that is, Catholic schools. Since no right to dissentient schools had been enjoyed since 1870, the practical result was that Catholics had to pay regular taxes for public schools while continuing to finance their own schools in full. Moreover, instruction in French, as well as the teaching of French and of religion, were forbidden by the advisory board.

Catholics of both languages joined together and brought their case to the courts. The decision at trial in City of Winnipeg v. Barrett was given by Killam, J., who held that the rights and

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6. 34 Vict., c. 12.

7. (1881), 45 Vict., c. 8, p.11.

8. (1890), 53 Vict., c. 38.

privileges of Catholics included the right of maintaining denominational schools, of having their children educated in them, and of having inculcated in them the religious doctrines of their denominations. The prejudice suffered by Catholics by the merger of Catholic and Protestant school taxes into a single public school tax to which Catholics objected was so indirect and distant that it did not attract the constitutional protection. This reasoning was upheld in the Court of Queen's Bench. The rights and privileges guaranteed were moral rights, and the practice followed in denominational schools could continue. One of the judges dissented: in his opinion, the guarantee included the right not to be forced to contribute to schools of which Catholics could not approve; the Act of 1890 took away this privilege and so was ultra vires.

The Supreme Court of Canada allowed Barrett's appeal. Ritchie, J. held that the new Act deprived Catholics of the system of voluntary schools that had been established in 1870 and maintained by school legislation in the province until 1890. Patterson, J. interpreted the expression "injuriously affect" in subsection 22(1) of the Manitoba Act to include the least interference with the rights and privileges of the denominations; mandatory taxation of Catholics to support the public system constituted such prejudice. Fournier, J. shared this opinion: he stated that the expression "practice" included more than the mere right of Catholics to maintain voluntary schools. Taschereau, J. stated that the interpretation applied by the City of Winnipeg took away any meaning from the expression "practice" in subsection 22(1) of the Manitoba Act.

It is clear that the question was far from being settled. The Manitoba problem contained elements that were not present in Ontario, Quebec or New Brunswick. In Ontario and Quebec, pre-Confederation statutes protected the right to religious dissidence, and denominational schools were provided "by law" and so were protected by section 93 of the Constitution Act, 1867; the debate concerned the extent of the rights conferred and also the right to determine the language of instruction. In New Brunswick, there was no legislation protecting Catholics and practice was not considered to be a source for such rights. In Manitoba, practice was protected; there was no law at the time of the Union. The court therefore first had to decide whether the right to support denominational schools exclusively was part of the practice before Union, and whether the public system prejudiced such right or practice.

The Privy Council could have shown generosity toward the Catholic minority - which was still of significant size in those days. But the approach it adopted was instead restrictive, and the judicial committee dismissed the action.



Lord MacNaghten first considered the pleadings, and then asked what rights Catholics would have had, had there been legislation in place before Confederation that governed the situation. In his opinion, such rights would have included the right to establish schools, the right to maintain them at their expense, and to conduct them in accordance with their own religious tenets. He added:

Possibly this right, if it had been defined or recognized by positive enactment, might have had attached to it as a necessary or appropriate incident the right of exemption from any contribution in any circumstances to schools of a different denomination. But in their Lordship's opinion, it would be going much too far to hold that the establishment of a national system of education upon a non-sectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, in that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other.

The last sentence of this obiter shows a certain lack of understanding of the problem. While it is true that the establishment of a public system does not mean the automatic abolition of the denominational system, the judicial committee betrays a fundamental misunderstanding of the problem when it states that it is going too far to claim that the existence of the denominational system requires immunity from taxation for the public system: whatever rights or privileges were reasonably guaranteed by the existence of the denominational schools in the specific case of Manitoba, was such immunity a right or privilege enjoyed by law or practice by Catholics in Manitoba in 1870? Thus it is not a question of whether the public and separate systems can co-exist, or of whether the existence of the denominational system requires exemption from public school taxation.

After describing the situation before and after 1890, the judicial committee asked "whether that Act prejudicially affects any right or privilege ... ." Here again, the answer is not based on a broad, liberal interpretation. Lord MacNaghten indicated that since attendance in the public school system was not compulsory, there was nothing to prevent Catholics from establishing their own private schools. If they must then bear a double financial burden, that is because of their religious convictions. The judicial committee recognized that this situation places Catholics (and Protestants) "in a less favorable position than those who can take advantage of the free education provided by the Act of 1890. That may be so." Lord MacNaghten added:



But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault. It is owing to religious convictions which everybody must respect, and to the teaching of their Church, that Roman Catholics and members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.<sup>9</sup>

This passage conjures away the fact that because of the mandatory taxation those who wanted to maintain denominational schools were paying twice and therefore lost a privilege that they enjoyed by practice in 1870, the privilege of directing their financial support to only one system.

Lord MacNaghten ended by reaffirming the exclusive powers of the provinces to make laws relating to education, "which on the face of it appear so large."<sup>10</sup> In his opinion, if the argument of the Catholics were accepted, it would be difficult for the province to exercise its jurisdiction, and its legislative power would be limited to minor questions. Lord MacNaghten was forgetting that provincial jurisdiction over education was already limited by the Constitution, in that it should not pass legislation that would prejudicially affect the rights and privileges of religious minorities; the province retained jurisdiction, intact and unaltered, over all other matters relating to education. So long as the legislature restricted its activities to the educational and administrative aspects of the schools, and was careful to preserve the rights of religious minorities, it was free to take whatever measures it chose. We believe that when Lord MacNaghten stated that the preservation of denominational rights would seriously restrict the constitutional powers of a province, he reduced the effect of the limits on the legislative jurisdiction of the province over education.

In any event, the failure of this legal challenge led Catholics to seek refuge in political action, and to exercise their remedy of appealing to the Governor-General-in-Council under subsection 22(2) of the Manitoba Act. For political reasons, the government was uncertain of its ability to hear such an appeal, and chose to submit a reference to the Supreme Court of Canada, in Brophy v. Attorney-General of Manitoba.<sup>11</sup>

The opinion of the Supreme Court of Canada does not appear to have been reported. The introductory summary to the opinion of the judicial committee of the Privy Council, once again called upon to consider education rights in Manitoba, indicates that the Supreme Court decided, by a three-to-two decision and for reasons that varied from judge to judge, that the appeal to the Governor-in-Council should not be allowed.

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9. P. 458.

10. P. 459.

11. [1895] AC, p. 202.

The questions submitted to the Supreme Court, and then considered by the Privy Council, may be summarized as follows:

- Is the appeal admissible by subsection 3 of section 93 of the British North America Act, 1867, or by subsection 2 of section 22 of the Manitoba Act, 1870?
- Does the decision in Barrett v. The City of Winnipeg dispose of or conclude the application?
- Did Manitoba school legislation prior to 1890 confer or continue any rights or privileges relating to education, as provided in 22(2) of the Manitoba Act, or did it establish a separate or dissentient school system as provided in 93(3) of the British North America Act, 1867? If the answer is yes, did the Act of 1890 affect such rights or privileges in such a manner as to give rise to the application?

It will be recalled that section 2 of the Manitoba Act, 1870 incorporates for Manitoba all the sections of the BNA Act, to the extent that the Manitoba Act does not alter them. Section 93 therefore applies in Manitoba, subject to the specific modifications set out in the province's constitutional legislation. Lord Halsbury, delivering the judgment of the judicial committee, referred to the similarities and differences between sections 93 of the BNA Act, 1867, and 22 of the Manitoba Act, and decided to interpret section 22. Before doing so, he reviewed the broad outline of educational history in the province, which we have considered supra, and noted the great importance the people of Manitoba had attached to the religious character of their schools:

Among the obstacles which had to be overcome in order to bring about that union, none perhaps presented greater difficulty than the differences of opinion which existed with regard to the question of education ... They (Manitoba Catholics) regarded it as essential that the education of their children should be in accordance with the teaching of their Church, and considered that such an education could not be obtained in public schools designed for all the members of the community alike, whatever their creed, but could only be secured in schools conducted under the influence and guidance of the authorities of their Church.<sup>12</sup>

In the opinion of the judicial committee, subsection 22(2) of the Manitoba Act set out the compromise that had been reached. The Barrett case had decided that the only right or privilege enjoyed by Catholics before the Union was the right to establish and maintain their own schools, and that the 1890 Act did not affect this ability.

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12. Pp. 213-214.

The judicial committee then attempted to justify this interpretation, which they acknowledged was restrictive:

But the question which had to be determined was the true construction of the language used. The function of the tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact. It is true that the construction put by this Board upon the first subsection reduced within very narrow limits the protection afforded by that subsection in respect of denominational schools. It may be that those who were acting on behalf of the Roman Catholic community in Manitoba, and those who either framed or assented to the wording in that enactment, were under the impression that its scope was wider, and that it afforded protection greater than their Lordships held to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret a statute. The question is, not what may be supposed to have been intended, but what has been said.<sup>13</sup>

The judicial committee thus reaffirmed its literal approach to the education rights guaranteed in section 93, again failing to understand the exceptional nature of a constitutional provision. While in other contexts the judicial committee managed both to apply ordinary statutory interpretation techniques and to imbue those techniques with dynamic force, they were not able to see their way to doing this when the question was education rights. This literal and strict interpretation may have been correct in law, but it is not appropriate to the complexities of constitutional law. Was the problem that the English judges were inexperienced in dealing with written constitutions, was it the common law approach that sees in a statute only a derogation from customary law, or was it a prejudice against Catholics? Whatever the problem was, the Privy Council's opinion in this case on the interpretation of section 93 of the BNA Act or its provincial counterparts would not likely be followed in the Supreme Court today, and while the decisions of the Privy Council are authoritative (but can be reversed by the Supreme Court, which is not legally bound by them), a modern party would be ill-advised to rely on this restrictive approach.

Before interpreting the second and third subsections of section 22 of the Manitoba Act, Lord Halsbury embarked on an elaborate dissection of their contents.

First, he stated that these subsections are not a way of implementing the guarantee of rights and privileges guaranteed in subsection 22(1). That subsection is complete in itself, and does not need implementation: any provincial legislation that violates it

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13. Pp. 215-216.



is ultra vires. An appeal to the Governor-in-Council does not preclude an appeal to the courts; the judicial committee emphasized that these were not two concurrent remedies for the same subject matter, but two distinct remedies. It relied for support for this proposition on the imbroglio that would result from contradictory decisions of the courts and the federal cabinet, and the futility of having political or legislative remedies when the courts could easily quash the offending legislation. The judicial committee's logic seems at first glance to be unimpeachable; however, a more thorough examination will show that the two remedies can be reconciled.

Nonetheless, Lord Halsbury drew comfort from the differences in wording between 22(1) and (2), and he was of the opinion that the two subsections dealt with different situations. He noted that 22(2) does not refer to the "Union," is not limited to "denominational schools," but includes any right "in relation to education," and does not affect "any class of persons" but rather "the Protestant or Roman Catholic minority." The judicial committee concluded: "In their Lordships' opinion the 2nd subsection is a substantive enactment and is not designed merely as a means of enforcing the provision which precedes it."<sup>14</sup> This conclusion is applicable to 93(3) of the BNA Act, 1867, which still provides a right today, despite having lain unused. The judicial committee also referred to this subsection in support of its conclusion that an appeal to the Governor-in-Council dealt with legislation affecting the rights and privileges of religious denominations even **after** Union.

Referring to the provinces' legislative sovereignty and ability to change the school system, Lord Halsbury noted that provincial jurisdiction over education is properly limited.

Having thus concluded that 22(2) could be applied in the case, the judicial committee set about demonstrating that the educational reform had in fact affected the rights and privileges of the Catholic minority. Whether or not such effect was lawful or unlawful was of no relevance.

As we know, a political compromise was then reached between Sir Wilfrid Laurier and Greenway to permit Catholics to receive a course of religious instruction in French. The use of French was also permitted when 10 students who spoke that language could be brought together. It was also provided that a French teacher could be employed when 40 Catholic children (25 in rural districts) were in attendance at a school.<sup>15</sup> These political compromises did not stand the test of time, and in 1916 these few compensations were abandoned and the legislature repealed these provisions.<sup>16</sup> This time there was no challenge.

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14. P. 219.

15. Cf., SM, 1897, c. 26, ss. 4 and 120.

16. SM, 1916, c. 88.



We may draw the following conclusions with respect to denominational schools in Manitoba:

- Subsection 22(1) of the Manitoba Act does not protect the right to public provincial funding or to immunity from school taxes for Catholics. Such immunity was not guaranteed by pre-Confederation practice. The only right Manitoba Catholics have is the right to establish and support private schools.
- There is nothing to prevent Manitoba from abolishing the entire denominational school system and imposing a mandatory school tax.
- The appeal to the Governor-in-Council for matters relating to education is distinct from the guarantee of denominational rights. The Catholic minority may appeal to the Governor-in-Council with respect to any provincial measure that affects any aspect of their educational rights.

While the public system is not itself denominational, there are a number of provisions in the Public Schools Act and the Education Administration Act dealing with religion courses and religious exercises, including an entire part of the Public Schools Act.<sup>17</sup>

### 3. Access to French-language schools

The history of access to French-language schools in Manitoba is one of slow changes. Section 240 of the Public Schools Act<sup>18</sup> provided that English was the language of instruction in the schools, but that another language could be used in three cases: for religious teaching; for language courses; and before or after regular school hours. French as first-language courses were first offered in 1955, for grades 4 to 12; in 1963 such courses were extended to all grades.

In 1967, the Act was amended and section 240 set out a procedure for recognizing French as a language of instruction; it could be used for a maximum of 50% of daily class time.<sup>19</sup> The school board could ask the minister to approve a proposal to offer courses in French "in the instruction of social sciences and such other subjects as the minister may, by regulation, stipulate."<sup>20</sup> Such a proposal had to

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17. Ss. 80-84.

18. SM, 1952, c. 50.

19. SM, 1967, c. 49.

20. S. 4.

set forth the subjects in which such courses would be offered, and set out the duration of time during which they would be offered. The minister's power was entirely discretionary:

- (9) The minister, **in his absolute discretion**, and having regard to pedagogical and administrative factors may approve, reject, or suspend all or any part of a proposal made under subsection (4); and, where he approves a proposal or a part thereof, he may approve it subject to such terms and conditions, **as he may deem necessary or advisable ...**.<sup>21</sup>

The subsection goes on to permit the minister to restrict the use of French to particular subjects, to specify the grades in which the use of French would be authorized, and to permit the children of parents who object to instruction in French to receive instruction in English.

The risk involved in these provisions is clear. They are discretionary, and as a result no rights are guaranteed. Regulation 76/67, adopted under this Act, provides nothing new. It was not until the 1970 reforms that the first guarantees of any substance for French-language instruction appeared. The new provisions<sup>22</sup> stated that French and English were the languages of instruction in Manitoba. No longer an exception to the rule, French acquired full and equal status in principle. The new subsection 258(8) imposed a limit for the number of children required for a French-language class: there must be 28 per class at the elementary level and 23 at the secondary, and the minister has discretion where there are fewer pupils. English as a second language is compulsory beginning in grade 4. The Act establishes three bodies: two language advisory committees, which together form the languages of instruction advisory council.

These provisions were clearly quite restrictive. Regulation 179-70 provides but few details. The school board still had to submit an application to the minister, who could approve courses and textbooks. It was provided that the language of administration in the school should be the language of 75% of the instruction provided, at the elementary level and 60% at the secondary; if French-language instruction varied between 50% and 75% at the elementary level, or was less than 60% at the secondary level, the language of administration should be the language in which most instruction was provided, but the minority language of the school should be used when pupils, teachers and employees did not have adequate knowledge of the principal language.

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21. S. 240(9), supra, footnote 19.

22. SM, 1970, c. 66.

In 1977, an official policy of the minister of education reiterated the government's agreement in principle concerning instruction in the two languages. However, as an internal document of the department indicates, enrolment in the French-language program did not appear to be limited exclusively to Franco-Manitobans. The government took the position that there must be freedom of choice: "Therefore, it is the view of the Department of Education that parents have the right to enrol their children in classes where English or French is the language of instruction or where both languages are used."

In 1980, the revision of the Manitoba statutes (and undoubtedly the constitutional debate that had begun) provided the occasion for revising the school legislation. The version then adopted is still in effect today. The number of pupils per class was reduced to 23 for every grade in the elementary and secondary levels, the committees were replaced by a languages of instruction advisory committee, four of the nine members of which are required to be French-speaking. Regulation 5-81 is only slightly different from the previous Regulation, and sets out the terms of office for members of the committee. The critical provisions of the Act are the following:

Public Schools Act<sup>23</sup>

79(1) Subject as otherwise provided in this section, English and French, being the two languages to which reference is made in the British North America Act, 1867, are the languages of instruction in public schools.

- We might note here that this provision could be amended today so as to refer not to the BNA Act, 1867, but to section 22 of the Manitoba Act, 1870, and to section 23 of the Canadian Charter of Rights and Freedoms.

(3) Where in any school division or school district, there are 23 or more pupils who may be grouped in a class for instruction and whose parents desire them to be instructed in a class where English or French is used as the language of instruction, the school board shall group those pupils, and upon petition of the parents of those pupils requesting the use of English or French, as the case may be, as the language of instruction in respect of those pupils, the school board shall group those pupils in a class for instruction and provide for the use of English or French, as the case may be, as the language of instruction in the class.

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23. Public Schools Act, SM, 1980, c. 33; RSM, c. P-250.

The other subsections of section 79 of the Public Schools Act present no real difficulties in relation to section 23 of the Charter. Subsection 4 provides that the minister has discretion when there is not the required number of pupils. Subsection 5 provides that the language of administration of the school shall be established by regulation, and the policy described supra has not changed since it was implemented. Subsection 6 provides that a course of English as a second language is compulsory from grade 4 to grade 12. Subsection 7 authorizes agreements between districts for the joint provision of instruction in French; in relation to subsection 41(5), referred to infra, this provision offers a different procedure for sharing responsibilities: rather than transport pupils to school districts where a program is provided in French, two school boards may join forces and resources to offer a joint program.

Section 79 is the cornerstone of the new system. The following aspect of this system appear to us to be unconstitutional:

- the requirement that the parents' petition for their rights could be contrary to 23, if 23 confers an automatic right and does not require a request as a prior condition to exercising the right;
- freedom of choice by parents as to their children's language of instruction appears to have been adopted.<sup>24</sup> There is no condition in the Act or regulations on admission to these schools. The departmental policy in 1977 even provided for the admission of francophones into French immersion programs. In such a situation it becomes difficult to distinguish between French immersion programs and French-language programs.

The profile of Manitoba confirms the discretion of school boards to group in the same schools - or sometimes the same classes - pupils in French-language and French immersion programs. This practice, like the requirements of the Schools Act that classes be homogeneous, does not promote the emergence of homogeneous schools, and could be considered unconstitutional.

- The Act does not in any way guarantee the right to homogeneous schools; technically, this right could only be granted if the required number of students was met for all grades required for the establishment of a school. Such a school would not be completely homogeneous, given the provision for complete freedom of choice; it would simply

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24. "... whose parents desire them to be instructed in a class in which English or French is used as the language of instruction."



be a school where all instruction was provided in French. The ACFO<sup>25</sup> case established the undisputed right of **those who meet the criteria set out in 23(1) and (2)** - and not of every parent - to establish homogeneous schools. The silence of the Manitoba Act places it below the threshold of legality, and must be considered to be inoperative. In addition, the Court of Appeal of Ontario emphasized the cultural specificity of these minority-language schools, and this specificity should be the governing factor.

- The Act does not guarantee the right to manage the schools. The language of administration must of course be French when 75% of the instruction, at the elementary level, and 60% of the instruction, at the secondary level, is provided in French. But there is a lot of difference between the language of the school and control of the school. As we shall see, one unit in the department deals exclusively with French-language instruction, including immersion and French as a second language. However, in the school boards, there is no provision guaranteeing any presence whatever for francophones. As a result, these omissions in the Manitoba legislation with respect to school management appear to be unconstitutional.

The provisions of the legislation relating to school transport could also cause problems. Subsection 42(5) requires a school board that does not offer a particular program to transport pupils to a school district that does offer the program, and to pay the costs of such transport.<sup>26</sup> While this may provide greater access for francophones to French-language programs, by grouping them together irrespective of school district borders, this provision could also permit a school board not to offer a French-language program (for example, under the pretext that there was not the required number) and to claim that it was nevertheless complying with its constitutional obligations by offering to transport the pupils to a school district that did offer the program. Such situations are not a priori unconstitutional; each case would have to be considered on its merits, taking into account criteria such as the number of pupils, the geographical concentration of pupils, their age and grade level, the distance to be travelled and the condition of the roads.

Subsections (8) and (9) of section 79 create and establish the organization of the advisory committee. With four seats out of nine, francophones could be in a minority on the committee. Since the fact is that this is a purely advisory body with no responsibility for actual management, the committee has no role with respect to

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25. Re Minority Language education rights (1984), 10 DLR (4th), p. 491.

26. Cf., s. 18 of Regulation 170-77.

subsection 23(3) of the Charter. However it would undoubtedly have been preferable to provide that the function of advising the minister on French-language programs was the exclusive prerogative of the French-speaking community.

This is the substance of the provisions for access to French-language schools in Manitoba. Regulation 5-81 supplements the legislation; sections 2 and 6 require the approval of the minister for a French-language course or program, and the minister may place such conditions on approval as he deems appropriate. Since there are no criteria provided for the exercise of the minister's discretion, it would be possible to challenge these sections of the regulation, or an unjustified decision by the minister under these provisions, on the ground that section 23 of the Charter no longer permits such absolute discretionary powers. Section 3 of the Regulation provides that in French-language classes, the time devoted to English must not exceed 25% of the total instruction time. That is not, in our opinion, a reasonable limit on French-language instruction.

The Manitoba courts have already considered one case relating to these provisions. In Damus v. Trustees of St. Boniface School Division<sup>27</sup> the question was the immersion program in St. Boniface. Some of the students at Howden School had been displaced to make room for immersion students, who had previously been accommodated at another, smaller school. The plaintiffs, parents of the displaced students, claimed that the school board did not have the right to take this action, and under the Act could not designate an entire school for immersion, but could only designate classes, and that the number of immersion classes was in any event insufficient to justify locating them all in one school. They did not challenge the right to offer immersion courses, but claimed that the relevant legislation must be interpreted restrictively, to exclude designation of a whole school. The case was heard and decided on the basis of section 258 of the 1970 Act;<sup>28</sup> in any event, the 1980 amendments would not have altered the result. Subsections (8) and (9) deal with the right to French-language instruction: "In a class in which ... French ... is used as the language of instruction." The court agreed that this provision applied to immersion programs; in the court's mind, this meant that immersion was a form of French-language instruction, or rather a form of instruction covered by the legislation, that is, in which French is used as the language of instruction. Is there actually a distinction? And if the court really found immersion to be the same as instruction in French, even implicitly, three thoughts come to mind: either the court is constitutionally in error, or the Act itself should make a distinction, or immersion is

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27. (1980), 108 DLR (3d), p. 530.

28. C. 669.1.

constitutionally acceptable as instruction in French (it should be recalled that the Court of Queen's Bench found the contrary in SANB v. Minority Language SB No. 50).<sup>29</sup>

Dealing with the question of homogeneous schools, the court found it surprising that the Act should not permit school boards to establish such schools; a number of homogeneous schools already existed in Manitoba and in some regions it would be impossible to have mixed schools. The school board must establish and provide programs approved by the minister, and courses in French are part of such programs. French immersion has been approved by the minister, so it is up to the school board to implement these programs. The school board has the power to determine the number and kind of schools, and this right includes the power to determine what school a pupil should attend.<sup>30</sup> No pupil has an established right to attend a particular school.

Thirdly, there was no breach of the duty to act fairly, since the trustees acted diligently and in good faith.

Finally, the plaintiffs sought a mandamus against the minister. The court stated:

I must confess that I find this claim difficult to understand. Under certain circumstances, mandamus will lie to compel the performance of a duty by a Minister of the Crown ... Counsel for the plaintiff finds in the language of section 258 of the Act and section 10 of Regulation P250-R12, an implied duty on the Minister to intervene in the decision-making process of a school board to require that the decision be taken within a framework which insures an orderly development of French language instruction throughout the Province. I see no such duty on the Minister. In my view, the Minister has no duty to require a school board to make arrangements for the use of English or French as the language of instruction in any class. Under subsection (9) of section 258, he may do so, but he is not required to do so.<sup>31</sup>

This passage is of considerable importance in relation to the remedies available in the power structures adopted by the legislature to provide education rights to linguistic minorities.

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29. (1983), 48 NBR (2d), p. 361.

30. Cf., Patrick v. Yorkton SD No. 159 (1914), 6 WWR, p. 1107; Re Robertson and Niagara South Bd. of Ed. (1973), 41 DLR (3d), p. 57.

31. Pp. 542-543.



The provinces have adopted a great variety of ways of dealing with the problem. When the power is conferred on the school boards, the minister may hesitate to interfere. Unless the Act gives him the responsibility to do so, he cannot be required to do so, and a petitioner must take his or her demands to the school board. The constitutional obligations under section 23 of the Charter do not therefore fall on the minister of education; they fall on the provincial legislature, which may delegate them as it sees fit. On the other hand, if the legislature decides to confer this authority on the minister,<sup>32</sup> the courts are not hostile to the idea of forcing him to act by mandamus, despite any question of Crown immunity. In this case, the court's comments were obiter and it did not have to consider the question.

Another Manitoba decision has dealt indirectly with the question of education rights in the province: Pernisi v. Swan Valley St.<sup>33</sup> The Court of Appeal ordered the school board to group the parents of 29 pupils who had requested a French-language class covering kindergarten and grade one. The Act does not distinguish among grades, and other school divisions offer this kind of class. The school board refused the request, and so did not exercise its jurisdiction. In Bachman v. St. James, Assiniboia SD No. 2<sup>34</sup> the Manitoba Court of Appeal held that the school board's decision to charge for transporting pupils in the French-language program while pupils in the English-language program received free transportation was discriminatory. The plaintiffs did not rely on the Charter, but with the entry into effect of section 15 this judgment may take on greater significance.

Despite the progress that has been made, Manitoba still has not met its constitutional obligations. As a result, it perpetuates a system which in practical application is inadequate and does not benefit the minority. The structures and provisions relating to the establishment of French-language classes and schools confirm this observation.

#### 4. Administrative structures and related matters

On the administrative level, the French-Language Education Bureau co-ordinates activities in the Department of Education for the entire French-language instruction sector. The bureau recommends priorities to the minister, and promotes, plans, applies, administers and facilitates all aspects of French-language education for francophone and anglophone pupils,<sup>35</sup> and co-ordinates all related

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32. New Brunswick and Nova Scotia, for example.

33. (1982), 18 Man. R (2d), p. 409.

34. (1984), 29 Man. R (2d), p. 66.

35. Definition of the Mandate of the French-language Education Bureau, Department of Education.



services. The bureau has no real decision-making power, and acts rather as a co-ordinator of French-language education.

The minister of education is responsible for all schools, by virtue of the Education Administration Act.<sup>36</sup> In particular, he may establish community colleges and technical and agricultural schools. Among other powers provided in the Act, he may:

- approve courses and books, and arrange for printing books;
- at his discretion or upon request, inquire into the standard of education in private schools;
- order a school to be closed in an emergency or "where he deems it in the best interest of the community in which the school is located" (par. 3(1)(i).

The minister has the power to make regulations:

- prescribing the qualifications for teachers;
- governing the operation of schools;
- prescribing grants to public schools;
- generally respecting all matters having to do with education in the province.<sup>37</sup>

This Act also creates the Text Book Bureau, which is responsible for textbooks.<sup>38</sup> School boards and private schools must order their books from the bureau. It does not appear to have a French-language division, on the basis of the documentation consulted to date. The Act does not mention French textbooks. One of the objectives of the French-Language Education Bureau is to intergrate all basic services that are essential to the development of French-language education; the bureau should therefore work with the Text Book Bureau to provide French-language schools with appropriate teaching materials in their own language.

The Public Schools Act appears to create two geographic structures: school districts and school divisions. A school district can be created by the Lieutenant-Governor-in-Council, who may also add territory to any school district.<sup>39</sup> Territorial changes are governed by section 5, and some people have raised the possibility of using this procedure for grouping French-language areas into a French-language school district. Since according to the court of Appeal of Ontario, subsection 23(3) of the Charter includes the right to manage the schools, and ignores traditional school district boundaries, it will be useful to consider this procedure for territorial changes, as in the cases of other provinces, to determine

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36. RSM, 1980, c. E-10, s. 2.

37. Ibid., s. 4(1).

38. Ibid., s. 9.

39. Ibid., s. 2(1).

whether it would be a barrier to the exercise of minority French-language constitutional rights. Subsection 5(1) provides that the following people and organizations may seek a change in school district boundaries:

- a school board
- a municipal council
- the administrator of a local government district
- 10 voters resident in the district in question
- 10 voters resident in a territory not established as a district
- the minister on his own initiative (subsection 5(2)).

The above may ask that the minister:

- establish a new district
- add territory to a district
- transfer territory from one district to another, including merging or dissolving a district.

The minister then establishes a board of reference, which determines whether the request will be accepted in whole or in part, or refused. Subsection 5(23) appears to give this board absolute discretion. It is not contrary to section 23 of the Charter to create such a committee, and it may even have the advantage of depoliticizing a delicate question to some extent. But in view of the Ontario case and of the provisions of subsection 23(3), it appears to us that granting such absolute discretion in making a decision that may affect the ability of the minority to exercise their constitutional rights is contrary to the Charter, and may be considered inoperative. The sources consulted do not make any reference to this procedure having been used by Franco-Manitobans. As well, there is no guarantee that there will be French-speaking members on the board of reference, even though it might be called upon to consider questions that are crucial to the future of that community. The members of the board are appointed at the discretion of the provincial cabinet and their two-year term may be renewed.

It would be beneficial for Franco-Manitobans to be able to control their own educational institutions. Part III of the Act deals with their powers and duties, which appear quite extensive.

The duties are set out in section 41; those that concern us are as follows:

- provide adequate school facilities
- publish annual reports
- employ teaching staff and prescribe their duties
- admit children of school age

- determine (note: at its discretion) locations for schools, and purchase, rent or renovate buildings for such purpose
- determine the number and kind of schools to be established in its territory (including French-language schools, undoubtedly).

The powers of interest to us are set out in section 48:

- establish evening, summer and day schools for special programs
- provide sports apparatus and material
- purchase books and give them to pupils
- collect fees equivalent to the net monthly cost of education from the parents of non-resident pupils
- enter into agreements for the attendance of non-resident pupils covering exchanges of educational services, cost-sharing; if the agreement is with a federal department, it is valid only with the approval of the minister.

Other:

- enter into agreements with private schools for the transport of pupils or the use of public school resources (s. 60);
- select sites for schools, purchase or expropriate the required land, purchase buildings, make renovations, with the approval of the minister, and permit the use of school property (ss. 61, 62, 69, 70);
- handle labor relations, in accordance with the law.

General financing arrangements for schools are described in Part IX of the Act. Without going into detail, we would note that as is the case almost everywhere else, financing is made up of government grants and taxes. Grants cover salaries, maintenance, administrative expenses, the cost per pupil, transport, construction and improvements, books, payment of debentures issued by school boards for capital purposes.<sup>40</sup> There must be a detailed calculation in the regulation. In addition, grants are given in a lump sum per teacher,<sup>41</sup> and special grants are authorized by cabinet on the recommendation of the minister.<sup>42</sup> The CEMC Report indicates that the department provides special development grants for French-language programs based on the enrolment of pupils in the programs, plus a special amount to cover additional expenditures resulting from the necessary duplication of programs or facilities (on the whole, these funds are provided by the federal government).

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40. Ibid., s. 41.

41. Ibid., s. 195.

42. Ibid., s. 021.

Base funding is given to boards that provide 75% of their instruction in French (the same level as referred to in the regulation). It appears that this funding is not renewed automatically, and the school board must present a long-term education development plan. Funding is also available for total immersion programs, partial immersion and French as a second language. Since the pupil populations of the various programs overlap, immersion seems to have a higher attendance and so to get more money, particularly since the proportion of French (75%) qualifies it for federal funding.

This funding mechanism, linked to attendance, may have the advantage of making accounting easier, but in the context of an apparently multiplying number of bilingual and mixed schools, does it really promote the creation of homogeneous schools? Requests for such schools should not be refused on the basis of simple financial considerations, or this method of financing could be challenged. The access to public funds guaranteed in 23(3) of the Charter could force the province to institute mechanisms that would be more encouraging and attractive in order to motivate school boards.

Thus it appears that there is a variety of obstacles to the creation of French-language school districts and homogeneous schools:

- financing that does not encourage such action
- a procedure for territorial changes in which the French-speaking community has no influence
- school boards with absolute discretion as to the location of schools and the kind of schools that will be established, which could be challenged.

While all these provisions would be valid in the context of the regular schools, they become suspect in relation to section 23 of the Charter.

### Conclusion

Manitoba must realize that further progress is required.

- There is a separate structure within the Department of Education, but it deals only with French-language instruction, including French as a second language; this French-Language Education Bureau has little power;
- school boards have a duty to establish classes; however, the minimum number of pupils required in order for the boards to do so is too high and is arbitrary;



- the process of territorial changes for the establishment of homogeneous school boards does not promote compliance with the right of francophones to manage their own schools; in districts where language grouping is possible, there is no mechanism to protect francophones;
- freedom of choice in the language of instruction could endanger the cultural specificity and possibly the homogeneity of classes;
- grouping pupils in immersion programs with those in French mother tongue programs destroys the objective described above.

To summarize, the Manitoban legislation appears to us not to be in compliance with section 23 of the Charter. It is too vague, and confers too much discretionary power on the school boards.

This legislation should be reworked on the basis of the new constitutional requirements.

**VIII. French-Language Educational Rights  
in Saskatchewan**



The Canadian West has never been known for taking steps to benefit its French-speaking minority. Although there are various factors to explain this attitude, the primary one is undoubtedly the decreasing proportion of francophones caused by the great numbers of immigrants who settled in the West. No comparison can be made between the situation of francophones in the West and the situation that exists in the East. This particular characteristic explains the distinctive complexion of language and education rights in the West. The way in which the communities are spread throughout a vast geographic area makes the implementation of education rights even more difficult.

In Saskatchewan, the history of legal guarantees of education rights illustrates the consequences of this demographic situation. The present provisions of the School Act dealing with minority-language rights are nonetheless subject to the constitutional requirements set out in section 23. While the demographic reality must be taken into account, the provisions of section 23 of the Charter must be embodied in legislative provisions that comply with the words and spirit of the Charter.

#### 1. Fact situation

The French-speaking minority in Saskatchewan is scattered over all the regions of the province; there are some larger concentrations in five districts: Prince Albert, Assiniboia, Meadow Lake, Saskatoon and Bellegarde. While the population of the province is growing, the French-speaking proportion is decreasing. In 1981, at 2.6% of the population of the province, francophones were the fifth largest ethnic group in Saskatchewan, behind Germans and Ukrainians, among others.

Saskatchewan has adopted the "designated schools" model, and 20 school boards had such schools in 1981-82.<sup>1</sup> Two kinds of programs are offered in the province: French as a first language, Type A, and Type B, which includes all other programs: bilingual schools and immersion programs. In 1982 there were only five Type A schools, as compared to 30 Type B schools. Of these five Type A schools, four offer elementary programs and only one offers secondary, and that school is a private school. Almost all the 30 Type B schools almost all offer elementary courses.

Brock Rideout's study indicates that in 1983 there were five Type A schools.<sup>2</sup> The Collège Mathieu was the only school at the secondary level to offer a Type A program.

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1. CMEC Report.

2. St. Joseph, Mgr. Laval, Ferland; and Collège Mathieu and Saskatchewan were the private schools.



There appears to be freedom of choice in language of instruction in Saskatchewan: anyone who meets the language requirements for a program may be enrolled and follow the program. The Rideout report also notes that the enrolment in designated schools is mainly English-speaking pupils in urban areas.

The average time of instruction in French has increased at the elementary level, hovering around 75%, but at the secondary level it is among the lowest in Canada, with an average of 40%. Pupils in French-language and immersion programs are merged: there is no homogeneity of language in the classes. Mr. Rideout concludes that the proliferation of Type B schools illustrates the preference of the francophone population for immersion and bilingual programs. However, from consultations with francophone organizations in Saskatchewan it rather appears that this preponderance of Type B schools arises from the refusal of the authorities to open or designate entirely French-language schools.

The procedures for designating schools permit and even encourage this attitude on the part of the majority with respect to the requirements for homogeneous schools. Before we consider this question, we shall briefly examine the denominational school system.

## 2. Denominational schools

When the Northwest Territories were created in 1880, the Northwest Territories Act<sup>3</sup> provided (section 10)<sup>4</sup> that the religious minority in a district retained the right to establish separate schools at their own expense. Section 17 of the Saskatchewan Act, 1905, provided that section 93 of the BNA Act, 1867, applied to Saskatchewan, but with the following changes:

- nothing in any school legislation shall prejudicially affect any right or privilege enjoyed by any class of persons with respect to separate schools, by virtue of ordinances 29 and 30 of 1901;
- in the distribution of funds by the legislature for the support of schools, "there shall be no discrimination against schools of any class described in the said chapter 29."

Not only were the rights of Catholics in Saskatchewan preserved, but they in fact were given an additional guarantee of equal treatment in the distribution of public funds.<sup>5</sup>

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3. Now RSC, 1970. c. N-22.

4. Now par. 13(r).

5. 4-5 Ed. VII, c. 42.

Since the existence of the Northwest Territories was first established by law, there have been school ordinances providing varying protection for denominational schools, which has continued to exist up to the present. Legal challenges dealing with section 93 of the BNA Act, 1867, have been scarce. The right to denominational schools had been established well before there was an official provincial constitution.

The very first school ordinance in the territories dates from 1887. Before that date, it appears that schools were regulated by the municipalities. Ordinance no. 2 of 1887, respecting municipalities, refers to a school tax in section 52 authorizing the municipality to levy a property tax, in section 92 authorizing the municipal treasurer to act as treasurer of the school funds, and in section 155 on the municipalities' power to impose taxes. Before 1884, there was no specific legislative provision relating to the establishment or management of schools. Ordinance no. 5 of 1884 began by establishing a board of education, which at the time had 12 members - six Catholic and six Protestant - divided into two sections by religion. Each section had full responsibility for its own schools.<sup>6</sup>

In the area of religious dissidence, any number of residents could call a meeting for the purpose of forming a separate school. A petition to that effect had to be published, stating the number of children affected and the religion of the parents. At the meeting, trustees were elected and the borders of the school district were established. A report of the meeting had to be submitted to the Lieutenant-Governor-in-Council who, if he saw nothing to prevent him from so doing, issued a proclamation establishing the separate school district.<sup>7</sup> The new board then had the same rights and duties as a public school board<sup>8</sup> and the financial support to which it was entitled was calculated on the basis of the amounts paid by supporters in municipal taxes;<sup>9</sup> in short, separate school supporters' money went only to support their own institutions. On the other hand, religious instruction was forbidden in any school in the province between 9 a.m. and 3 p.m., and religious exercises could only be authorized by the school board.<sup>10</sup> We should also note subsection 15(1) of the ordinance, which provided with respect to notices:

Such notices may be either printed or written and must be in both the French and English language.

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6. Ss. 3-5.

7. Ss. 25, 27, 29.

8. S. 26.

9. S. 32.

10. S. 84.

Ordinance no. 3, which appeared in 1885, brought a number of changes. The board of education was reduced in numbers by half, but the proportion of Catholics and Protestants remained intact.<sup>11</sup> The powers of the board as a whole included controlling, examining and assessing teacher qualifications. The two sections retained their control over their own schools, and could revoke teachers' certificates and adopt lists of authorized books. Public notices no longer had to be bilingual.<sup>12</sup> The only noteworthy change with respect to separate schools was that the Lieutenant-Governor-in-Council lost his discretionary power over the establishment of a district: he was required to establish a district if the vote taken at the meeting indicated the support of a majority of the voters present. In addition, in 1885 wider powers were given to inspectors with respect to the efficiency and effectiveness of the schools, compliance with the list of prescribed school books and examination of teacher candidates.

Ordinance no. 2, in 1887, implemented a number of significant changes in the educational system in the territories, of which the most important were the following. The board of education increased to eight members, but for the first time Catholics were in the minority, with only three of the eight members.<sup>13</sup> The duties of the board as a whole included uniform inspection, examinations, granting certificates and classifying teachers, and most notably the responsibility for all schools that were not designated as Protestant or Catholic. The two sections retained their control over their own schools and the right to appoint inspectors and examine teachers.<sup>14</sup>

At this point, mere residents could not request the establishment of separate schools; for the first time, they had to belong to a religious minority of taxpayers within a district that was already established. While school district borders could be changed upon request, section 42 put this power in the hands of the Lieutenant-Governor. The duties of the school boards, including separate school boards, were set out in section 48, and included:

- (1) selecting a site, at or as close as possible to the center of the district;
- (2) hiring teachers;
- (4) constructing, repairing and renting facilities;
- (6) dismissing teachers for cause;

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11. S. 3.

12. S. 14.

13. S. 1.

14. S. 36.

- (8) selecting school books from the list of books approved by the minister.

For the first time, the teaching of certain subjects became compulsory: reading, writing, spelling, arithmetic, geography, grammar, English and Canadian history, English literature;<sup>15</sup> as may be seen, there was no place for instruction in French. This provision reappeared in the 1888 revision of the ordinances, c. 59, s. 82. We shall pursue the history of this provision in the next section, since it refers to French-language education.

The most significant reform occurred in 1901. We find the origins of the first Saskatchewan School Act<sup>16</sup> in the ordinances of that year.

The board of education was then five members, of whom two were Catholic;<sup>17</sup> it was responsible for examining and reporting on the regulations relating to inspection, the training and certification of teachers, and reference books. For the first time, there was a reference to public and separate schools. Section 41 et seq of the Act of 1909 contained the same provisions for the formation of separate school districts that we saw supra.<sup>18</sup> Any religious minority in a district was entitled to have its own separate schools. A request to this effect was to be signed by three residents and submitted to the minister. After a meeting was held and there was a vote in favor, the minister would establish the separate school board for the district, with the same rights as the public school board. These sections remained substantially the same until enactment of the new Education Act in 1978.

Section 22 of that Act provides that taxpayers in the Catholic or protestant minority in a district may establish a separate division. A plan must be submitted to the minister by three of these people, setting out a map of the proposed geographic area and the names and addresses of the electors who are of the same religion as those who are making the application. The minister approves the plan, and the applicants then call a meeting in order to take a vote concerning the establishment of a separate school. A report of the vote is submitted to the minister,<sup>19</sup> and once the minister has made an order establishing the division a board is elected. The Act says nothing about ministerial discretion, but we must infer from the

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15. S. 83.

16. RSS, 1909, c. 100.

17. S. 8.

18. RSS, 1978, c. E-0.1.

19. S. 24.



wording of the Act and from general principles governing ministerial powers that the minister does in fact have such discretion.<sup>20</sup>

There has not been the abundance of cases in Saskatchewan that we have seen in Ontario, although there have been a few cases that have dealt with the interpretation of these provisions. In City of Regina v. McCarthy,<sup>21</sup> the exemption from public school taxation and provision for separate school taxation were considered by the Privy Council to be a rigid system binding on Catholics in a district where separate schools had been requested. While the minority was protected, the minority within the minority was not. The establishment of a separate school district indicated that there had been a calculation of the available financial resources, but in order for this calculation and the entire voting mechanism to operate in a stable manner, the Catholic minority must be taken as a whole. If someone does not want to support the Catholic school, he or she should not declare himself or herself to be a Catholic. The Court of Appeal of Saskatchewan also clearly stated in this case that non-Catholics could not be Catholic separate school supporters and were required to pay taxes to the public school system.<sup>22</sup>

In Pander v. Melville<sup>23</sup> the Court stated that Ruthenian Greek Catholics could be considered to be Catholics and be permitted to support the Catholic separate schools.

The only case from that period of any significance is Regina Public School Trustees v. Gratton Separate School Trustees.<sup>24</sup> The Supreme Court stated that the School Act did not give the separate school any automatic right to share in corporate school taxes.

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20. Ss. 24, 25.

21. [1918] AC, p. 911.

22. Neida Case (1917) 1 WWR, p. 1088; 10 Sask. LR, p. 29; 32 DLR, p. 755.

23. [1922] 3 WWR, p. 53.

24. [1915] 7 WWR, p. 1248; 8 WWR, p. 156; 50 SCR, p. 589; 21 DLR, p. 162.

In Bintner v. Regina Public Service Board No. 425 the Court of Appeal of Saskatchewan ruled on an allegation of discrimination against the Regina public school system. The plaintiff was a Catholic who had supported the public schools when a Catholic district was established. The public school board refused to admit the plaintiff's child, because its policy limited access to public schools to children who belonged to the religion of the majority of the residents. The Court of Appeal stated that whatever the results of this policy might be it did not constitute discrimination within the meaning of subsection 13(1) of the Saskatchewan Human Rights Act. Catholics had a recognized right to education which they could exercise in the separate schools.

In Moose Jaw SD Bd. of Ed. v. Attorney-General Saskatchewan<sup>26</sup> the Court of Appeal reiterated the rights of the separate school boards. The Teachers Collective Bargaining Act, SS, 1973, c. 112, provided for two levels of negotiations. Salaries, allowances, compensation and other benefits were established province-wide, and vacation, pay periods, teacher selection and assignment of administrative and teaching duties were established locally. The Court of Appeal held that the substance of this legislation was education rather than labor relations, so that the court was required to consider the applicable constitutional provisions, beginning with subsection 93(1) of the BNA Act, 1867. The court referred in passing to the rule of interpretation that it intended to use in this case, which would not be accepted today, in light of later decisions: "... the BNAA, 1867, was to be interpreted as other statutes by ascertaining its meaning from its own terms where these were clearly expressed without reference to external sources or references."<sup>27</sup>

The provisions of section 93 are clear: the jurisdiction of the province is limited only by the protection for denominational education. With respect to the provisions that were challenged, the court noted that the rights to hire, to assign teaching and administrative duties and to establish the kind and quality of programs, were not directly covered by the legislation. Caught up in the Privy Council's musings over restrictions on and denials of rights, and relying on the accepted theory with respect to the separate jurisdiction of the two levels of government, the court added:

The Saskatchewan Legislature has the sole right to legislate on matters of education in this Province, subject to the provisions in the Saskatchewan Act referring to the ordinances of 1901. In

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25. (1965), 55 DLR (2d), p. 646.

26. [1975] 6 WWR, p. 133, 57 DLR (3d), p. 315.

27. P. 318.

exercising the exclusive right to legislate on education it may well be that legislation may indirectly or incidentally affect or in some way bear upon the rights of separate schools or minorities. This in itself would not make it ultra vires. Where, as here, the effect or thrust of the legislation is to establish a uniform system for settling the pay of teachers, the legislation is within the powers of the Province as set out in section 93 of the BNAA, 1867, as amended by section 17 of the Saskatchewan Act.<sup>28</sup>

This passage shows the narrow scope of the cases dealing with denominational education rights. The protection given to Catholics in Saskatchewan resembles that enjoyed by Catholics in other provinces, but nevertheless denominational education rights must be taken into account in any attempt to restructure the provincial school system.

In the next part we will encounter other problems in the legislation as it relates to access to French-language schools and classes.

### 3. Right of access to French-language schools

The present provisions for access to French-language schools in Saskatchewan grew out of the history and development of the rights to French-language education; as we shall see, this has been a history of slow reform.

It will be recalled that in 1887 for the first time a list of compulsory subjects was set out in section 83 of ordinance no. 2. We noted that this list required that English history and literature be taught. If the message was not made clear enough by that provision, the revised school ordinances of 1888<sup>29</sup> added an additional statement: "It shall be incumbent upon the trustees of all schools organized under this ordinance to cause a primary course of English to be taught." English was therefore a compulsory subject at the elementary level, which was at the time the only level at which there was any significant attendance. In ordinance no. 22 of 1882 (the school ordinances of the area were changed nearly every year), section 83 reversed this tendency, and required that all compulsory subjects be taught in English. There was little interest shown in the teaching of French literature (which in any event had to be taught in English). Section 83, which was the precursor of the provisions that governed the language of education in Saskatchewan for a long time thereafter, read as follows:

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28. P. 320.

29. C. 59, s. 82.

All schools shall be taught in English in reading, writing, orthography, arithmetic, geography, grammar, history of Britain and Canada, French and English literature, in accordance with the program of studies prescribed by the Council of Public Instruction.<sup>30</sup>

Apart from this language requirement - which made the provision cited supra redundant, although subsection 83(1) remained in effect - the provision that the council of public instruction would be responsible for the content of the program of compulsory studies was a new concept. In 1896, a new mandatory language provision, clearer than and opposite to the 1887 provision, was adopted: "All schools shall be taught in the English language but it shall be permissible for the trustees of any school to cause a primary course to be taught in the French-language." It should be noted that in 1887 a minimum course in English had to be offered ("it shall be incumbent ...") while ten years later a course in French was neither "incumbent" nor even "lawful," but merely "permissible."

Not until the 1915 Act<sup>31</sup> was amended was this policy changed, although the result was only slightly better. the Saskatchewan legislature enacted an Act to amend the School act,<sup>32</sup> which set out what had long been the government's official languages policy:

- 178(1) Except as hereinafter provided, English shall be the sole language of instruction in all schools, and no language other than English shall be taught during school hours.
- (2) In the case of French speaking pupils, French may be used as the language of instruction, but such use of French shall not be continued beyond grade 1 and in the case of any child shall not be continued beyond the first year of such child's attendance at school;
- (3) When the board of any district passes a resolution to that effect, the French language may be taught as a subject for a period not exceeding one hour in each day as a part of the school curriculum, and such teaching shall consist of French reading, French grammar and French composition;
- (4) Where the French language is being taught under the provisions of subsection (2) or (3), any pupils in the school who do not desire to receive such instruction shall be profitably employed in other school work while such instruction is being given.<sup>33</sup>

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30. School ordinance, 1882, No. 22, s. 83.

31. Sask. c. 23.

32. 1918-19 Sask. c. 48, s. 14.

33. Cf., RSS, 1920, c. 110, s. 178.



We would make the following comments about the provisions of this section of the Act:

- subsection (1) elaborates on the provisions of section 83 of ordinance no. 22 of 1896. While the list of compulsory subjects is not set out in the Act, the minister of education having the jurisdiction to establish compulsory courses, the requirement that instruction be in English is universal. In addition, the specificity with which it is provided that "no language other than English" be used would lead us to guess that the legislature was having some difficulty in having this requirement complied with;
- subsection (2) authorizes instruction in French in grade one or during the pupil's first year of school, which is some legal progress. This provision does, however, seem to be a concession on the part of the legislature to the social reality of the time: francophones have to learn in French at school before they can turn their talents to other use. In the 1920s the sophisticated modern approach to immersion was not yet understood, and the legislature clearly indicated that this privilege of taking grade 1 in French was reserved for French-speaking pupils;
- subsection (3) clearly delegates responsibility for offering French courses in future to the school board. While such courses were in fact only tolerated, the Act gave them a more official status, but in defining the content limited the flexibility teachers needed to keep French culture alive.

In any event, this provision remained virtually intact until 1967. Subsection (2), relating to grade 1, was repealed in 1921, so that the only legal provision for the teaching of French in school, for the greater part Saskatchewan's history, was for one hour per day in all grades.

In 1944, Saskatchewan carried out a major reform of the school system. The Larger School Unit Act<sup>34</sup> permitted the Lieutenant-Governor-in-Council to merge school districts into larger divisions. These divisions were headed by school boards, but the districts retained their trustees at the local level.

The power of the trustees to authorize instruction in French appears to have been retained as well. Subsection 77(8) of the 1965 revised statutes<sup>35</sup> authorized the trustees to hire teachers;

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34. 1944, 2nd, c. 41.

35. RSS, c. 185.

section 80 expressly preserved the power to authorize instruction in French. Subsection 82(1) required that the school board hire a teacher selected by the trustees; subsection (2) provided that the board retained some discretion if it considered that the candidate's qualifications were inadequate - but it had no such discretion in determining the candidate's ability to teach in French. As a result the school board had to hire the candidate proposed by the trustees to teach French, and it was the trustees themselves who decided whether or not to offer the course, and selected the teacher.

The amendments enacted in 1967 brought some needed flexibility to this rule, but progress was still minimal.

Subsection (1) of section 209 of the School Act<sup>36</sup> was less stringent in its English language requirements: "Except as may otherwise be provided in this Act, English shall be the language of instruction in all schools" - a general principle, rather than a demand. The exception to this principle appears only in the next subsection: "Subject to the regulations of the department, where the board of a district passes a resolution to that effect French may be taught or used as the language of instruction for a period of one hour or for periods aggregating not more than one hour a day as part of the school curriculum." This provision is clearly an improvement, albeit slight, over the earlier legislation. French no longer had to be a separate subject, but could be a language of instruction on its own. The use of French could be aggregated, so long as the total was equivalent to one hour per day. For the first time, the department of education indicated that it would exercise closer control over the situation by regulation. Finally, the enlarged school board of the school unit, as well as the local trustees, could authorize instruction in French.

This was only the beginning. In 1968<sup>37</sup> subsection (2A) was added to 209 to permit the provincial cabinet to designate schools where French could be used, and fix the courses and number of hours for its use. In his study, Mr. Rideout indicated that the first school to be thus designated was the Catholic St. Paul School, where the time is allocated as follows: in grade 1, four classes, 55% of teaching time; in grade 2, maximum of 45%; in grades 3 to 5, 40%. The subjects to be taught in French tend to deal with cultural material: history, geography, and of course French.

Between 1968 and the next legislative reform, no fewer than 17 individual designations were made, with some schools being redesignated every year to increase the use of French. Mr. Rideout compiled these designations in the form of a table, from which he drew the following conclusions:

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36. RSS, 1965, c. 184.

37. C. 66, s. 14.

- French was introduced gradually, beginning in grade 1 and increasing in subsequent years. The same was true of daily instruction time in French, up to maximums of 75% in grades 1 and 2, 60% in 3 and 4, and 50% in 5 and 6;
- while there was no apparent logic to the subjects that were not taught in French, which made a disparate listing and varied from one school to another, they included English, religion, physical education and sometimes mathematics;
- the entire system appeared to be made to measure to deal with individual situations, in his opinion, and to take into account the abilities of pupils and teachers.

Subsections (2) and (2A) were amended in 1973-74:<sup>38</sup> trustees could pass resolutions authorizing the use of French in schools with respect to a class or a district, and cabinet could impose conditions on the schools designated by it. Thus designation was no longer mandatory. The one hour per day limit was removed entirely, and the exception became the rule. In addition, the resolution could also authorize instruction in any language other than English, and not only French. However, the limits in (2A) applied only to French. It appears that the system permitted languages other than English to be used more sparingly, but that while French could be used more widely it was to be used subject to the regulations adopted by cabinet. cabinet's regulatory powers were broadened in 1975 to include generally the use of a language other than English, so that it was no longer a question of piecemeal implementation of instruction in another language.

Finally, when the Education Act was revised, in 1978, the provisions affecting the use of French were reworked. The legislation itself is not of great assistance in understanding the situation, since most of the governing provisions are imposed by way of regulation. The overall system remained largely unchanged. Section 180 reads as follows:

- 180(1) Subject to subsections (2) and (3), English shall be the language of instruction in schools;
- (2) Subject to the regulations, where a board of education passes a resolution to that effect, a language other than English shall be used as a language of instruction in specified schools in its jurisdiction;
- (3) Subject to any conditions that may be prescribed in the regulations, the Lieutenant-Governor-in-Council shall designate schools in which French shall be the principal language of instruction in a designated program;

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38. C. 103, s. 10.



- (4) Notwithstanding clause 91(g), a pupil shall be entitled, at the request of his parent or guardian, to attend a designated school mentioned in subsection (3) and to receive instruction in a designated program appropriate to his grade or year;
- (5) Where a language other than English is used as a language of instruction under subsection (2) or (3), no pupil whose parent or guardian has requested in writing that the pupil not be required to receive instruction in that language shall be required to receive such instruction, and that pupil shall be provided with suitable alternative studies appropriate to the instructional program of his grade or year.<sup>39</sup>

To summarize, before we look at the regulation, the system seems to function as follows, according to the legislation:

- there must be a resolution of the school board in the division for a language other than English to be used as a language of instruction, unless the system of designated schools is used;
- cabinet must designate schools in which French will be the principal language of instruction in a designated program;
- at the request of the parents, children are entitled to attend a designated school and to receive instruction in a designated program.

We may observe here already that the requirement of a resolution of the school board does not seem to be a prerequisite for a school to be designated. It appears from the Act that if cabinet has no discretionary power with respect to designation, its obligation to designate schools in which French will be the principal language of instruction flows directly from the regulations, which we must consider in examining how the entire system complies with section 23 of the Charter. The right to receive instruction in French becomes, in subsection 180(4), a right of a pupil whose parents have requested that he or she attend a designated school. If this were a method by which the right could be exercised, we believe that nothing more would need to be said; the system of designation could be one of the administrative models that could be followed. However, if such a request is a condition placed on obtaining the right, the system is left open to criticism. Whether or not a program is designated should not prevent someone who has a constitutional right to receive services to which the fundamental law of the society entitles him or her from exercising that right. Moreover, if the parents must request French-language education in order to be entitled to access

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39. 1978, c. 17, s. 180.



to it, the Charter is being violated: we have already indicated that in our opinion section 23 does not require that there be a formal application for the right to be exercised. The course should be offered, and the normal procedures in the circumstances followed: define the geographic area to be served, make provision for transportation and provide for the enrolment of new pupils. It may of course have been the intention of the legislature in subsection 180(4) to respect the rights of the parents once a request is made. As may be seen, the validity of the legislation comes down to the validity of the designation process. Finally, since the Act sets out no criteria for access to these programs, it appears that there is freedom of choice.

We cannot criticize the board of education itself; in fact, the provisions of subsections (3) and (4) setting out the obligations described appear to be valid at first glance. The right of access is guaranteed by subsection (4), subject to the requirement that the parents make a request - which we would note is not at that point a condition for designation but rather a reasonable limit relating to exercising the right of access. (This opinion may have to be changed after we have considered the regulations.) Moreover, subsection (3) requires that the Lieutenant-Governor-in-Council designate a school, subject to the conditions that he may impose by regulation. The Act tells the Lieutenant-Governor-in-Council, you must designate schools, but you can place conditions on these designations by regulation. We find nothing unconstitutional in this. The Charter does not demand that all the conditions appear in the legislation; the legislature is free to delegate its constitutional obligations to the executive. That is what it has done here, and by doing so it has opened the door to the possibility that an obligation will become a discretionary power. The obligation in the Act is specifically made conditional in the regulations - but generally speaking a regulatory power cannot be made into a power of absolute discretion. We will have to examine the regulations closely in this respect.

Before forming an opinion about compliance with the Charter we will therefore have to consider the regulations. Sections 32.1 et seq. of Regulation 118/79 describes the process in detail. The provisions are rather lengthy, but should be quoted in full for our purposes here:

32.1 In this section and in sections 32.11 to 32.9

- (a) "designated" means designated pursuant to section 180 of the Act;
- (b) "designated program" means Type A French Language Program or Type B Immersion/Bilingual Program;

- (c) "parents' council" means a parents' council formed pursuant to section 32.11;
  - (d) "Type A French-Language Program" means a program of instruction:
    - (i) in which:
      - (a) French is the language of instruction for all courses of study except English;
      - (b) provisions are made for complementary activities that emphasize French-Canadian culture; and
      - (c) the administration and operation of the program is conducted in French, but, where requested by parents, guardians or members of the teaching staff or administrative officials, the intent of administrative and operational procedures and directives may be communicated in English; and
    - (ii) provides in the whole or a portion of a facility which assures its self-contained operation and administration;
  - (e) "Type B Immersion/Bilingual Program" means a program of instruction consisting of various courses of study in which more than 50% but less than 80% of the total instructional time is in the French language.
- 32.11(1) In the school division where no board of trustees exists, the parents and guardians of the pupils enrolled or proposed to be enrolled in a designated program shall form a parents' council;
- (2) The parents' council shall act in an advisory capacity to the board of education.
- 32.2(1) A board of education may, of its own initiative, request the minister to recommend to the Lieutenant-Governor-in-Council that a school be designated and that a specific designated program be established or continued in that designate school;
- (2) Where a request is submitted to a board of education before the December 15 preceding the school year in which a designated program is proposed to begin or continue, asking that a school be designated and that a specific type of designated program be established or continued in that designated school;

(a) in a school division that is divided into school districts, by a board of trustees or a local school advisory committee established pursuant to section 138 of the Act; or

(b) in any school division that is not divided into school districts and in which there is no designated program of the specific type proposed, by means of a petition from a parents' council representing the parents or guardians of 15 more pupils;

the board of education shall request the minister to recommend to the Lieutenant-Governor-in-Council that a school be designated and that a specific designated program be established or continued in that designated school.

(3) Where a board of education is empowered or required to make a request to the minister pursuant to subsection (1) or (2), it shall submit the request to the minister before the February 15 preceding the school year in which the designated program is to begin or continue, together with a plan which defines the implementation of the designated program, the resources to be provided and the administrative structure to be established;

(4) Notwithstanding subsections (1), (2) and (3), where a designated program is to be continued without any changes being made to the designated program, the board of education, of its own initiative, or at the request of the parents' council, shall submit the request to the minister before the March 15 preceding the school year in which the designated program is to continue;

(5) The minister shall recommend to the Lieutenant-Governor-in-Council that a school be designated where:

(a) a request for the designation of the school has been submitted to him:

(i) before the February 15 preceding the school year which the designated program is to begin or continue by a board of education acting in accordance with subsection (3) or by the governing body of a private school; or

(ii) before the March 15 preceding the school year in which the designated program is to continue by a board of education acting in accordance with subsection (4) or by the governing body of a private school;

- (b) the school:
    - (i) will have at least 15 pupils enrolled in each instructional group; or
    - (ii) will offer only a designated program; and
  - (c) the minister is satisfied that:
    - (i) a designated program of the specific type proposed can be operated for at least three consecutive years; and
    - (ii) where the pupil will offer only a designated program, adequate provision has been made for the education of pupils who do not wish to enrol in the designated program.
- (6) Where the minister makes a recommendation to the Lieutenant-Governor-in-Council, the Lieutenant-Governor-in-Council shall designate the school and the specific type of designated program, and shall specify in the order the division and year levels to which the designation applies and the school year during which the order is effective.
- 32.21 A board of education shall develop the plan mentioned in subsection 32.2(3) in consultation with the parents' council or, where applicable, with the board of trustees.
- 32.3 The board of education shall recognize the additional needs of the designated program in its allocation of staff and resources.
- 32.4(1) Subject to subsections (2) and (3), where:
- (a) there is no designated program appropriate to a pupil's grade level available in his attendance area; or
  - (b) subject to the approval of the department, the specific type of designated program established in a pupil's attendance area is of a different type than the designated program in which the parents or guardian of the pupil wish the pupil to be enrolled;
- the parents or guardian of the pupil may enrol the pupil in a designated program in a designated school outside the pupil's attendance area by applying to the board of education in the pupil's attendance area.
- (2) Where the entitlement described in subsection (1) is to be exercised with respect to attendance of a pupil at a designated school located:



- (a) in the same school division in which the parents or guardian resides, the board of education shall make the necessary arrangements for the enrolment of the pupil;
  - (b) outside the school division in which the parents or guardian resides, the board of education shall, on its own initiative or with the assistance of the department, make arrangement for the enrolment of the pupil;
  - (c) outside the attendance area in which the parents or guardian resides, the board of education in whose local attendance area the parents or guardian resides shall assume full organizational and financial responsibility for the transportation of the pupil.
- (3) Notwithstanding subsection (2), where the department confirms that the requested type of designated program is available within the school division or attendance area in which the parents or guardian resides, the board of education may choose not to arrange for attendance of a pupil at a designated school outside the division.
- (4) A board of education shall not charge a non-resident pupil a tuition fee to enrol in a designated program in a designated school under its jurisdiction.

32.5 The parent or guardian of any pupil attending a designated school is eligible to serve on any local school advisory committee that may be formed with respect to that designated school.

32.6 Notwithstanding sections 32.2 to 32.5, a board of education or the governing body of a private school may, by resolution, approve the use of a language other than English as a language of instruction in any specified school in its jurisdiction to a maximum of 100% of the instructional time at the kindergarten level and to a maximum of 50% of the instructional time at other division levels.

32.7 Where a language other than English has been authorized as a language of instruction under section 32.3 or 32.6:

- (a) the regulations pertaining to programs, courses of study and instructional resources apply; and
- (b) approved or authorized English-language courses of study are to be provided at all division levels beginning no later than Division I, Year III.

32.8(1) In the calculation of the grant paid to any board of education or private school, the department shall, subject to the regulations, recognize approved implementation and incremental costs associated with:

- (a) any additional requirements in the program for which a language other than English has been authorized pursuant to section 32.6; and
- (b) any additional requirements of a designated program.

(2) Where, pursuant to subsection f(1), a pupil is enrolled in a designated program in a designated school located outside the attendance area of the school he would otherwise be eligible to attend, the department, in the calculation of grant payments, shall recognize the approved costs of travel and accommodation incurred by that pupil.

32.9(1) The board of education shall prepare an annual accounting of the disposition of moneys incurred in the calculation of its grant as a result of the application of subsection 32.8(1).

(2) The annual accounting mentioned in subsection (1) is to be presented at the annual meeting of the school division and copies are to be made available to the minister and, upon request, to the board of trustees and to the parents' council.

We shall now consider these provisions in the context of the Charter. The province's educational structures include the following authorities:

- In a school division there is a board of education;
- when the division is composed of districts, each district has a board of trustees or a local school advisory committee;
- when there are no districts in a division, it has a "parents' council" representing the children enrolled or proposed to be enrolled in a designated program.

The definitions indicate that there are two types of designated programs that may be offered in designated schools. It will be recalled that the Lieutenant-Governor-in-Council must designate a school if the conditions set out in the regulations are met. He does not designate a program but a school. In addition, he sets out in the order what courses or grades to which the program will apply. Is this merely a question of semantics? No, since as we shall see, it appears that the school board, and not cabinet, decides what type of program the school will offer, although the situation is certainly far from being clear.

The following steps are taken to have a school designated:

1. The designation process is started by a request to the minister, which may be made pursuant to 32.2:
  - (1) by a school board, on its own initiative;
  - (2) by a board of trustees or a local advisory council, when the school division is divided into districts;
  - (3) by a request from the parents' council, representing the parents of at least 15 pupils, when the division is not divided into districts and there is no program of the type requested in the division. Section 32.2 is silent as to what happens if there is such a program; presumably, by virtue of section 32.4, the children must attend that program. This interpretation would lead to the logical conclusion, difficult to justify in practice nonetheless, that when a school in a division has been designated the parents cannot request that a second school be designated. The only method of obtaining more than one designation in a single district would be to ask the school board to make a request to the minister, with no assurance that the school board would comply. This may not have been the effect intended by the legislature, but it appears to be the effect produced, according to the words of the section itself.
  - (4) If a designated program is to be continued without change, the request may be made by the school board on its own initiative or on the request of the parents' council.

At this point we would note that in our opinion the requirement that there be a request does not comply with section 23 of the Charter. The provision respecting the conditions on which a school may be designated also appears to contravene the Charter, in our opinion, in that:

- it makes the exercise of the right conditional on submission of a request (by virtue of 180(4) of the Act, the right can be exercised only in a designated school, and a request is a prerequisite to designation, so that exercise of the right is therefore subject to the requirement that a request be made);
  - when a request is to be made by a school board, the board has the totally discretionary power to decide whether to make the request and to determine the terms of the request;
  - it is also within the discretion of a board of trustees or a local advisory committee as to whether to make a request; unless these bodies are controlled by francophones - which is not guaranteed by the legislation and is difficult to achieve in practice, although it has occurred in some places - they will not be free to exercise their rights or to force the board or committee to act. The Charter confers the right to have their children educated in French on the parents themselves, and so they may rely on section 23, regardless of the discretion bestowed on the school authorities, which would appear to be inoperative because of the absence of criteria for exercising it;
  - the required number of 15 children was established arbitrarily;
  - it appears that the 15 children must be found within the single division;
  - there is no requirement relating to the qualifications of the parents, so that freedom of choice is permitted.
2. The second stage consists of the recommendation of the minister to cabinet. Subsection 32.2(5) of the regulation sets out the conditions on which the minister shall recommend designation to the Lieutenant-Governor-in-Council:
- (a) the request has been submitted to the minister within the time provided, that is:
    - (i) by February 15 preceding the school year in which the program is to begin, for a new designation
    - (ii) before the March 15 preceding the year in question for a continuation
  - (b) the school to be designated
    - (i) will have at least 15 pupils per instructional grouping; or
    - (ii) will offer only the designated program



- (c) the minister is satisfied that
  - (i) a designated program of the specific type proposed can be operated for at least three consecutive years; and
  - (ii) where the school will offer only a designated program adequate provision has been made for parents who do not wish to enrol their children for this instruction.

Thus there are five main conditions:

1. A request submitted before the deadline;
2. the school will have 15 pupils per class or;
3. the school will offer only the designated program even if there are less than 15 pupils per class;
4. the minister believes that the program may be offered for three consecutive years;
5. the minister believes that the parents who do not want this program will be able to obtain education in accordance with their choice.

If these conditions are met, the minister has no discretion: he must ask the Lieutenant-Governor-in-Council to designate the school. Are these five conditions contrary to the Charter? Or are they an unlawful sub-delegation of power?

- First condition (time limit): if the Charter does not permit a right to be subject to the requirement that there be a request, this condition is inoperative; a court could find that it is not a reasonable limit;
- second condition (number): the arbitrary number of 15 pupils per class is of no effect, according to the ACFO case;
- third condition (homogeneous school): when a school offers Type A, it is actually a homogeneous school. In that case, the minister must make a positive recommendation (if the other valid conditions are met). We have seen that there are only five Type A schools, which is very few. What can we say? Perhaps the social conditions necessary to establish a homogeneous school rarely occur, which we would hesitate to acknowledge; perhaps there is very little demand for Type A, which we would also find unlikely; perhaps the minister or the school boards are converting a request by parents for a Type A into a request for a Type B, or demanding that Type B be requested. There is

actually nothing in the legislation to require that the authorities comply with the type requested by parents - although in the Providence school case in Vonda, it was argued in support of the application for permission to appeal<sup>40</sup> that the authorities must take the request as they find it and pass it intact from one to the other of them until it is approved by the Lieutenant-Governor-in-Council;

- this opinion is based on the provisions in the regulation, which nowhere permits the school board, the minister or cabinet to alter a request submitted by the local authorities, but rather gives them the right only to decide whether it has met the conditions in the regulation. Both of these interpretations may be argued, and both have strengths and weaknesses. If the authorities have the discretionary power to alter a request, it is clear that it will be difficult to control this power. If they have no discretionary power, and if only one of the conditions required for the request to be accepted is considered to be missing, the whole process will have to be started over if an alternative solution is to be found, with the result that the process becomes slow, burdensome, delayed and discouraging. Thus our theory to explain the proliferation of Type B schools is weak. Even if there are not 15 pupils per class, a request for a homogeneous Type A school could be made, under the regulation. On the other hand, the expression "a designated program" in subparagraph 32.2(5)(b)(ii), which is the subject of these remarks, does not mean designated by the parents, but designated by cabinet.

Does the Charter vitiate this condition that a school must offer only the designated program? This condition in the regulations appears to us in itself to be legitimate. Cabinet made the regulation to restrict the minister's discretion, and this requirement is one of the provisions made for that purpose. If we limit our remarks to Type A programs, which in our opinion comply with the obligations of section 23 of the Charter, a request for designation as a homogeneous Type A school must be accepted even if there are fewer than 15 pupils in a class;

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40. Application for leave to appeal to the Supreme Court from a judgment of the Court of Appeal of Saskatchewan, February 2, 1981.

- fourth condition (viability of the program): this is a discretionary power given to the minister. The minister must be satisfied that the program will be viable. Again, this requirement is not in itself unacceptable: there is nothing to prevent cabinet from giving the minister this power, since it is restricted and the criterion for its exercise is relatively well defined. However, vigilance is required in the exercise of the power. Moreover, the criterion itself could always be challenged on the grounds that it does not have the required element of reasonableness. It could be argued that three years is too long; that there is no way of knowing whether the program will be viable for the whole time; that the future cannot be committed like that. It is very difficult to anticipate how the courts will react to this kind of argument;
- fifth condition (choice for anglophones): the comments made supra apply mutatis mutandis.

To summarize: the ministerial power in the designation process appears to us to be a pleasing mixture of discretion with mandatory conditions. The requirement of a request and of a minimum number of pupils appears to us to be open to being challenged; the three other conditions are, in our opinion, less suspect, at first glance, although the reasonableness of the conditions could be challenged. In addition, the exercise of these discretionary powers could produce unfavorable results for the minority. It is more difficult to challenge discretionary decisions in the courts.

3. The third step is the cabinet designation itself. The minister must first have recommended designation. When he has done so, subsection 32.2(6) appears to be clear: the Lieutenant-Governor-in-Council shall designate the school and the type of program. He shall also specify in the order the grades to which the designation applies, and the school year during which it is effective. Since the decision is mandatory, this final step is in fact a ratification by the executive of a decision by the minister. While in law the action of the Lieutenant-Governor-in-Council establishes the concrete right to instruction in French, politically the minister has already established the procedures for exercising the right in the specific cases in question. This first step does not in our opinion represent a denial of the rights guaranteed in section 23, if it means what we take it to mean.
4. Before we consider the procedures for transporting pupils, we shall make some final comments on this examination of the legislation and the regulations. First, there are

problems in the Act itself. Why is French considered to be an exception to the rule of unilingual English-language instruction? Subsection 180(1) which sets out this principle betrays the spirit of section 23 of the Charter, which establishes the right of minority-language groups to receive instruction in their own language and places them on an equal footing with the majority. Francophone citizens in Saskatchewan enjoy this right as equals, and not as exceptions to the rule.

Subsection 180(2) of the Education Act deals with cases in which an entire school is to be designated. In our opinion, this provision covers mixed schools and French-language classes. The school board's discretion to pass a resolution authorizing the use of French as a language of instruction is not restricted by the Act or the regulations. In so far as this absolute discretion affects the rights of Canadian citizens under 23, it must give way to the provisions of the Charter.

Subsection 180(3) requires the Lieutenant-Governor-in-Council to designate schools, but delegates to him the authority to establish the procedure for doing so by regulation. We have analyzed this procedure and challenged the minimum number required (15 per grade for at least three years), the requirement that a request be made, and the fact that the calculation is done within a single school division. The other conditions appear to be open to challenge as well, but the chances of success would be smaller. We would also like to note another aspect that does not facilitate the exercise of the right: the complexity of the procedure itself. While the numerous steps to be taken have the merit of clarifying the roles of each of the actors, they are all obstacles where the process may become stalled: first, a request by the trustees or the school advisory committee, parents' council or school board itself of its own initiative; then a recommendation by the minister, based both on the objective criteria (receipt of the request, number) and on subjective criteria (viability of the program, provision for non-participants); and thirdly, an order by the Lieutenant-Governor-in-Council. Several school years might therefore go by before a school is designated. The designation could also change a request for a Type A into a Type B designation, and the latter type does not, in our opinion, meet the requirements of the Charter. If the trustees, parents' council or school board refused to make a request, could francophone parents themselves approach the minister directly, or perhaps even approach cabinet directly as people with a legal right they wish to exercise? Must they



await a refusal by cabinet to go to the courts? This entire system is designed on the basis that the school to be designated will be homogeneous; we have seen that such homogeneity is missing in some areas of Saskatchewan. Will the system really be of benefit for francophones in the province? What can they do if it is proposed to designate a new school for French-speaking students from throughout the division, and to remove and relocate the English-speaking students already in the building concerned? What can they do if all they want is a French-language class? The designation process in place seems - and the facts confirm this appearance - to favor Type B immersion schools, which include both English- and French-speaking students. While a detailed examination has not brought out as many flagrant violations of the Charter as in other provinces, the overall picture indicates that the rights of francophones in Saskatchewan appear poorly protected. The very complexity of the process set out in the legislation and regulation discourages any progress in these rights, just as it makes it difficult to analyze the situation. Each step in the process may be seen in isolation as a reasonable limit, but taken together they do not fit this description. It would be interesting to see whether the Supreme Court of Canada would take a tolerant view of this proliferation of levels, criteria and requirements in order to obtain what is the only option in the Saskatchewan situation, the designation of a school. In spite of this, the system seems, in our opinion, to be one of the best organized. There are defined criteria, and only a few discretionary powers. Subsection 180(4) confers a true right on a pupil whose parents request that he or she be permitted to attend a designated school. But the rigidity in this process does not satisfy the categories set out in 23, and provides for total freedom of choice - which does not, in our opinion, comply with the Charter. Moreover, the right conferred by the system here to French-language instruction can be exercised only if a school is designated; if there is no designation, there is no way to exercise the right. Note, however, that the Act does not require that the right is not restricted under the Act to a school division; it exists for any designated school.

## 5. Transport

Section 32.4 is admirably clear on the requirements for obtaining transportation. This is the clearest provision we have encountered in this study. Apart from how it is applied, the regulation itself sets up intelligible criteria. Transport must be provided:

- when there is no designated program appropriate to a pupil's grade level "in his attendance area" (the area served by a particular school);
- when the specific type of designated program in the school is of a different type from the program desired by the pupil's parents, but in this case the permission of the minister is required.

Given this right, section 32.4 of the regulation sets out various possibilities:

- the school board with jurisdiction in the district where the parents reside shall be responsible for all expenses and for arranging transport, if the pupil has to travel from one attendance area to another;
- the school board with jurisdiction in the district where the parents reside shall arrange, alone or with the assistance of the minister, for enrolment of the pupil when he or she must go to another school division. The school board of the division to which the student travels shall not charge tuition fees. In view of the preceding provision, since the pupil must leave his or her area of attendance, the school board of origin is responsible for the costs of transport, and not the school board to which the pupil travels;
- if the minister confirms that the desired program is offered in the school division where the parents reside, the school board may then decide to enrol the pupil in another school division or to keep the pupil in its division and transport him or her to another attendance area.

As we have seen, the combined effect of subsection 180(4) of the Act and section 32.4 of the regulations is that there is no limit in Saskatchewan on the right to French-language education based on numbers, geographical area or distance, once there has been a designation. It is therefore the designation process that must be examined, since it is the basis of the entire legislative and educational structure. We would repeat that on the basis of the details we have described the system appears to us to conform to the Charter. It is one of the most clearly defined systems, and among the most sensitive to the wishes of the local people, along with the system in New Brunswick. The technical precision of the Act should not lead us to forget that it may be applied in an inappropriate manner. The proliferation of Type B schools, disproportionate to the number of Type A schools, implies that francophones will have to make serious efforts to make the system work in their favor. There is

also the possibility that transporting pupils is not a reasonable approach - for example, if a pupil wishes to receive French-language secondary education he or she has to go to Collège Mathieu, the only Type A designated institution in the province at the moment, and not all francophones in the province live in the vicinity of Gravelbourg. The designation process should therefore be generally applied so that other institutions may offer a full French-language program.

To summarize, the following points require correction:

- the prior condition of a request by parents, the advisory committee or the trustees or the school board. At the outside, a requirement of a request by parents could be allowed, for practical reasons, but the Charter confers a right on parents who must not have to depend on the goodwill of the school board;
- the requirement of 15 students per grade needed for designation;
- the requirement that the program be viable for the next three years;
- the opportunity for the minister to change a Type A request to a Type B designation, or to offer to transport pupils and refuse the designation;
- the system's emphasis on population concentration; more flexibility is required to facilitate people joining together to obtain designation. Tying designation to an attendance area results in a requirement that there be a concentration of francophone population before other students can be brought into the school, since designation must occur before access can be requested;
- open access by everyone to French-language schools.

We would also note the following points:

- discretionary powers are not extensive, and those that do exist are defined and subject to conditions on exercise;
- cabinet, and not the school board, makes the final decision, so that greater objectivity may be anticipated;
- the right of access to designated schools is not restricted by geographical area or number;
- arrangements for transportation are very clear, and leave no room for discretion. However, they could be used to shield the minister if he wished to refuse a designation.

We must hope the francophones will take maximum advantage of this system.



In 1980 the weaknesses in the system were illustrated in the Vonda case, which was the impetus for the present amendments to the regulations. The dispute arose over section 180 of the Education Act of 1978, and illustrated the omissions in the Act, since the regulation had defeated the right granted in subsection 180(4). The case indicated that the delegation to the Lieutenant-Governor in subsection 180(3) was one of the cornerstones of the legislation; however, if viewed in light of section 23 of the Charter imposing a mandatory duty on every authority with jurisdiction over education, the Vonda case might have come out differently, in spite of the discretion that arose from the delegation of power.

The facts were as follows. Providence school in Vonda serves a relatively large region. It is part of the enormous Saskatoon East school division, the borders of which, incidentally, separate two francophone communities, thereby reducing their numbers. (This practice should not prevent francophones from having their own institutions, with the advent of section 23.)

Providence school offered a Type B program up to grade 9. The parents were requesting that the program be extended to grades 10 and 11. Until then, the pupils had been taking courses in those grades at the neighboring Aberdeen school, which was a considerable distance to travel for some of them. When the French-language grade 10 course was closed because of the low enrolment, the parents took steps to have the Providence school program extended to grades 10 and 11. The school board refused, and instead suggested that the pupils study as residents at the Collège Mathieu in Gravelbourg (at the expense of the parents; the Collège received a grant of \$1,933 per year to cover costs not covered by tuition fees), and four paid trips per year (Gravelbourg is a four-hour bus ride from Vonda), or transportation to Holy Cross school in Saskatoon (56 km further south). One of the affidavits presented by the school board's director of education alleged that between 1977 and 1981 four or five pupils had been enrolled each year in each of grades 10 to 12. There was a projection of an increase to eight or nine pupils. The school board's offers, supported by the department, were refused and the case went before the courts. The applicant parents and the school trustees sought a mandamus.

At trial, the court dismissed all of the applicants' arguments. It dismissed the application on a variety of grounds, all of a more or less technical nature. The first ground concerned the standing of the applicants: in the court's opinion, the fact that one applicant was the chairman of the board of trustees of the school did not give him the necessary locus standi: it was he himself, and not the trustees, who was seeking the mandamus, but he had no personal interest in the matter. It should be noted that this technicality was not in itself fatal; it brings to mind the literal formalism of



the Privy Council at the beginning of the century. Secondly, and just as technically, the judge claimed that simply by citing the relevant legislation and regulations the applicant had not shown any ground in support of his application. While this suggestion could be disputed in any event, it certainly is not a concept that should be applied in interpreting the Charter.

Of greater significance is the opinion of the court on the merits. The 1978 regulations did not contain the same provisions as today. The process was still a four-step procedure: request of the board of trustees, request of the school board, recommendation of the minister and finally the obligation of the Lieutenant-Governor-in-Council to designate a school. However, the difference from 1984 lay in the fact that the 1978 provisions gave the minister discretion as to whether he would make a positive recommendation, even if all the relevant criteria were met. The minister alleged that his refusal was based on this discretion; the applicant replied that when the Act required that the Lieutenant-Governor-in-Council act, it conferred a positive right on the francophone applicants. The court noted another technicality in passing: while the request by the trustees covered only grade 10, the application for mandamus covered kindergarten to grade 12. The school board could therefore not be forced by the court to fulfil a request that it had not received, to establish a French-language program for the entire system.

The court stated:

The board could not be ordered to forward a request to the minister under regulation 32.2(3) in respect of designating grades K to 12 when the request by the Trustees, under regulation 32.2(3)(a) related only to grade 10; and the applicant has not asked for an order compelling the Board to send a request to the Minister in respect of grade 10 only.<sup>41</sup>

Recognizing, however, the technical nature of these factors, the court went on to deal with the merits of the issue: did the school board have a duty to request that the minister recommend designation to the Lieutenant-Governor-in-Council? In other words, assuming that the trustees had made a valid request, can the school board recommend against designation, or make no recommendation at all? In the opinion of the court, pursuant to the decision in R ex rel. White et al. v. Board of Trustees of Prince Albert RC Sep SD No. 6,<sup>42</sup> the school board had no discretion, and must submit the request to the minister:

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41. R ex Rel LeBlanc & Board of Education of Saskatoon East SD No. 41, Sept. p. 5-6.

42. Judgment, October 7, 1980.

In my opinion, when a valid request is submitted to the board by the trustees, the board has a duty in turn to forward its request to the minister, and mandamus will lie to compel performance of that duty.<sup>43</sup>

The court appears to have defined the role of the school board as a simple vehicle for passing the request to its destination, in this case, the minister. The Act was clear, and on this point it has not been changed; however, if the school board is acting only as a relay, the inference is that it cannot change the type or grades set out in the request, which contradicts our previous analysis. This portion of the judgment, along with the wording of the Act and the regulation, could support both interpretations, and we prefer the second approach, which places binding obligations on the school board.

On the other hand, the minister could not be required to recommend anything to cabinet. First, according to the regulation, he had complete discretion - which has been considerably diminished, as we have seen. Secondly, any duty that the minister has is to the Crown and not to a citizen:

Likewise, the reference to the minister recommending to the Lieutenant-Governor-in-Council obviously implies a duty to the Crown. There are no words in this regulation which could be construed as a duty owing by the minister to the applicant. Because of his expertise in matters of education, the minister has been given the responsibility of advising the Lieutenant-Governor-in-Council regarding the designation of schools.<sup>44</sup>

The reasons set out in this passage are a source of rather more difficulty, because the present regulation contains the duty that the court refers to as owing to the Crown, rather than to a citizen. The same reason could be argued against us again, and could be set up as a bar to an application for a mandamus. However, it would be easy to answer today that the right to instruction in French, regardless of whether there must be a designation process, and the corresponding obligation on the school authorities now flow from the Charter, which is imperative constitutional legislation and prevails over other legislation, and grants rights to citizens, not to the minister. Overall, this judgment will have little effect on the future development of education rights for francophones in Saskatchewan; the revision of the regulations, together with the enactment of section 23 of the Charter, put most of these arguments out of date. What about the judgment of the Court of Appeal? Does it offer us anything

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43. Supra, footnote 36, pp. 6-7.

44. Id., pp. 7-8.

of relevance? In a very brief opinion, the Court of Appeal simply stated that the only duty of the school board was to request designation; having done its duty, it could do nothing more. The grades, procedures and phases of application for the designated program are all outside the scope of the regulation. Obiter, the Court of Appeal endorsed the opinion of the trial judge that the minister's duty was to the Crown, and that his role was a discretionary one.

The 1981 amendments were undeniably brought about by this decision. Major restrictions were placed on the discretion of the minister, and the designation order by the Lieutenant-Governor-in-Council must now specify the grades to which the designated program will apply, as well as the proportion of time that will be taught in French and which courses will be instructed in French.

Application for leave to appeal to the Supreme Court of Canada was refused.

The amendments to the regulation and the enactment of section 23 of the Charter put these two decisions out of date, uninspiring as they were in any event. The only argument that dealt with the merits (apart from the procedural technicalities noted by the trial judge) that we can take from it appears to us to be of debatable validity: that the duty is owed to the Crown. Even if it is true that the regulation requires the minister to transmit a request to the Lieutenant-Governor-in-Council, and does not require the minister to comply with the request by designating a school, the minister's duty nonetheless flows not only from the regulation, but also from the Charter. This recommendation process is in effect a method for implementing the rights guaranteed in section 23, and if the minister does not fulfil his obligations, subsection 24(1) could offer to an applicant, whose rights have been prejudiced, a remedy that was previously missing from the law.

#### 4. Administrative structures and related matters

In August 1980 the department of education officially established the Official Minority Language Office (OMLO). The office is headed by a director who is responsible directly to the deputy minister. It has a small staff; two program specialists acting as consultants to school boards and schools. The office has also hired four advisers on contract to perform studies and propose programs. The objectives of the OMLO included:

- developing policies, programs, teaching manuals and consultation services;
- assisting in recruitment and training of competent teachers;
- promoting the extension of French-language instruction in the province.

The office's work seems to have influenced the amendments to the Education Act, to some extent.

Of course, program development remains one of the responsibilities of the department, and the bureau has a consultative function in this process. The minister has the following powers under the Act:

section 9

- (a) prepare and distribute advice and recommendations on school management;
- (c) provide programs and curriculum guides;
- (d) establish the objectives for future development of education;
- (e) provide a list of texts and material for teaching;
- (g) make regulations respecting teacher certification.

section 10

- (c) appoint people to advise on location, specifications, financing and maintenance of buildings;
- (f) suspend certificates for cause;
- (i) authorize the use of books and materials;
- (j) prescribe subjects and course content for all grades;
- (k) authorize additional courses offered by school boards;
- (l) prescribe requirements for teacher training, including for special programs;
- (m) alter the boundaries of any school division or district when he considers it advisable.

The Lieutenant-Governor-in-Council had the following responsibilities in the area of regulations, pursuant to section 372:

- (c) classification, organization, administration and supervision of all schools;
- (d) classification of pupils and programs;
- (f) professional development of teachers;
- (i) purchase, location, specifications and maintenance of buildings and other facilities related to education;
- (j) transporting pupils;
- (k) conditions for provision of textbooks free of charge;
- (n) payment of fees by parents;
- (o) use of any language other than English as language of instruction.



Beginning in 1978 when the Act was revised, all school districts and high school districts were designated as school divisions.<sup>45</sup> The minister has the power to establish new divisions, with the approval of the Lieutenant-Governor-in-Council, in territory where no division exists or by merging existing divisions, when he considers it appropriate and in the interests of education.<sup>46</sup> In addition, he may change the borders of school divisions:

- on the request of a school elector with respect to a parcel owned or rented by him;
- on the request of one or more school boards, with respect to territory contiguous to the divisions concerned;
- when he considers that the change is in the interests of education;
- on the advice of the Educational Boundaries Commission.<sup>47</sup>

This commission is composed of three members appointed by the province; it is required to study proposals for change, and examine economic factors, population changes, increases in enrolment and other factors related to the provision of educational services.<sup>48</sup>

It is clear that francophones have no specific rights with respect to territorial changes - no more than have anglophone taxpayers themselves.

The Act gives the school boards primary responsibility for education. They are made up five to 10 members, the number being established when the division is created by the minister.<sup>49</sup> Their duties include:<sup>50</sup>

- (b) exercising general control over schools and making the appropriate by-laws with respect to school management;
- (d) providing and maintaining school accommodations, equipment and facilities;
- (e) hiring teachers;
- (g) assigning pupils to schools, subject to the rights of access to French-language schools;
- (h) determining what schools and classes will remain open in the division;
- (i) determining boundaries of school districts, subject to section 120;

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45. S 19.

46. S 20.

47. S 27.

48. S 16.

49. S 32.

50. S 91.

- (j) approving the program in each school;
- (k) providing such transport as they consider necessary to ensure access to the schools and attendance, subject to the regulations;
- (l) providing programs for pupils;
- (w) regulating the use to be made of schools.

Their powers include:<sup>51</sup>

- (a) hiring such ancillary personnel as they may consider necessary for the administration of their programs;
- (b) entering into agreements with other boards, municipalities, specialized institutions, universities, provincial and federal departments, in order to improve the services that they consider necessary and advantageous for the quality and efficiency of educational services available to pupils in the division;
- (c) entering into agreements with other boards for the joint provision of some services;
- (d) providing books and food services at nominal cost to students or, where considered advisable, at the cost of the division;
- (e) approving textbooks and materials, subject to the regulations;
- (r) prescribing the qualifications of teachers working in the separate schools;
- (u) closing schools or parts of schools, or discontinuing one or more grades offered in a school; in the case of a school situated in a district, this shall only be done if:
  - (i) the board of trustees or the advisory committee has agreed or
  - (ii) the school board has given notice of its intentions to the council or committee at least 6 months prior to the closing, and has consulted them as to alternative;
- (v) if the school board deems it advisable and expedient it may enter into agreements with other boards or institutions accredited by the department for the provision of educational services outside the division;
- (w) when the board makes arrangements for a pupil in its jurisdiction to attend a school in another division, it shall pay the parents an amount to be determined by it to cover or replace transportation expenses.

It will be noted that the school board has significant powers related to providing French-language education and implementing the right granted in section 180 of the Act. We would emphasize them here:

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51. S 92.

- hiring additional teachers for French-language instruction;
- approval of materials;
- closing classes or schools, or discontinuing some grades, even against the wishes of the local authorities;
- making agreements for transporting pupils to other divisions.

All these discretionary powers can have considerable effect on francophones, and in this respect the Act seems to be lacking precision. We would note that under paragraphs (b) and (c) of section 103, when the board considers it inadvisable to maintain a school, or when by virtue of the low enrolment it is difficult to maintain an acceptable standard of quality in educational services, the board must consult with the electors at an annual meeting or special meeting and report to the minister any decision or recommendation that comes out of these consultations as they affect the future development of the division. It should be noted that the board is in no way bound by the opinions of the electors.

The boards of trustees are in charge of school districts included in the division. They may be francophone, when the districts cover a homogeneous community. However, their much narrower powers put them in about the same position as advisory committees. Section 136 provides that they have the following responsibilities:

- (b) hold an annual meeting of the electors and inform them about progress in the provision of educational services;
- (c) advise the school board on any question of interest respecting education in the division;
- (d) supervise the schools in accordance with the policies of the school board;
- (g) subject to 180, make recommendations as to the language of instruction in the district.

When there is no school district, advisory committees perform about the same role.

With respect to school attendance, section 143 prohibits any person involved from refusing access to educational services in the division, while section 144 grants a right to access to instruction free of charge for any person between six and 21 years of age.

The administrative structure does not favor francophones in Saskatchewan. The school boards have the power, and the territory administered by them tends to scatter the forces of francophones, who are lost in large organizations that they cannot control. At the local level, they may be able to control the boards of trustees, but these bodies have no real power.

## 5. Proposals for reform

Several proposals are now circulating in the francophone community of the province. One suggestion is that there be agreements with the private schools. Another is embodied in draft legislation that has been presented to the minister of education.

The 1982 Saskatoon agreement was entered into by the separate school board for the city and the parents' council of the French-language school. It includes the following five principal elements:

1. The parents' council has full authority and responsibility for the program of instruction in the school, within the normal standards established by the department, the Act and the regulations;
2. the school division will hire only such personnel for the school as is recommended by the parents' council, which determines hiring criteria;
3. the school division will admit pupils to the school in accordance with the admission criteria established by the parents' council;
4. the school division will administer and manage the budget in accordance with the priorities established by the council;
5. transportation will be provided by the school division and will cover the entire city.

The admission criteria established by the board have two aspects: first, the child must have an adequate knowledge of French; secondly, at least one of the parents must have French as his or her first language.

The first condition appears to us to be a reasonable limit;<sup>52</sup> the second is a repetition of the criterion set out in paragraph 23(1)(a) of the Charter. While this restriction may have worthy objectives, the classes of persons with a constitutional right to access to French-language schools cannot be restricted,<sup>53</sup> and the second condition should therefore include parents who qualify under 23(1)(b) or 23(2).

The agreement represents an original compromise between the status quo and administrative arrangements, but we might ask what remedy the parents' council would have if the minister required that it be cancelled, by virtue of his general power to control education,

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52. SANB v Minority Language School Board No 50 (1983), 48 NB (2d) 361.

53. Quebec Association of Protestant School Boards et al v Attorney General for Quebec (1984) 10 DLR (4th) 321, SCC.



or if the school division did not comply with its terms, and did not respect the criteria established by the parents' council, or withdrew from it unilaterally. The agreement is a practical method of implementation, but it offers little legal security for enforcement of the rights in section 23 of the Charter.

The draft legislation was presented to the minister of education in October 1984; on November 17, 1984, he announced that he would not agree to the proposal.<sup>54</sup> Moreover, the minister of justice announced on November 19, 1984, that he was similarly opposed to the proposal; in his opinion, the present Act complied with the Charter.<sup>55</sup> The draft legislation embodied the concept of a homogeneous school board for the entire province. Since this is, to our knowledge, the first attempt by a French-speaking minority to set out its demands in the form of legislation, this proposal is of some interest for us. The proposal was drafted as Part IX of the Education Act. Its preamble reflects the manner in which it came about:

By the establishment of the Fransaskois board of education in this part, it is recognized that there exists in Saskatchewan a minority of French-speaking citizens who have educational needs for their children different than those persons who simply want a bilingual French-English education for their children. The main purpose of the Fransaskois board of education is to permit and encourage the establishment of Fransaskois schools and programs, to allow those persons of French-Canadian culture and heritage to manage and control their own educational facilities throughout the province irrespective of school division boundaries.

We shall consider the various structures and programs proposed in this proposal.

1. The proposal establishes three structures: a parents' council, a board of trustees and a board of education.

(a) Parents' council

The parents' council is defined in section 5 of the bill as being composed of any parent of francophone heritage or cultural background, who communicates with his or her children in French, and who has a child of preschool age whom he or she wishes to enrol in a Fransaskois school, or a child of school age with sufficient French language ability to be able to follow the program in his or her grade in the school where he

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54. Leader Post, Regina, Nove 17, 1984.

55. Letter from the regional office of the Department of the Secretary of State of Canada.

or she will be enrolled. There will be a parents' council for every school. This council appears to represent the potential pupil population of a Fransaskois school. The concept is used to determine from the census what electors<sup>56</sup> and candidates<sup>57</sup> are eligible.

Since this concept could affect access to French-language schools it may be an infringement of section 23 of the Charter. We find it difficult to determine whether these conditions would be prohibited restrictions on the classes of persons defined in section 23, and so we will have to look at them separately.

- any parent: the extension of the categories to apply to one parent only rather than both appears to comply with section 23;
- francophone heritage or culture: this criterion appears to us to be too vague and difficult to define. It could limit the classes defined in section 23, which are to be preferred;
- who communicates with his child in French: we would note that this criterion is an original one; however, is this a reasonable limit or a denial of the right? Some parents could qualify under 23 but could not meet this condition. Given the rigid approach of the Supreme Court in the Bill 101 case, cited above, the classes set out in 23 cannot be restructured by ordinary legislation. It could be argued that this requirement is justified by the need to maintain the homogeneous character of the school and the language ability of the pupils. If this condition were seen by a court as an unjustifiable limitation on the class of people, it would be declared inoperative; if the court finds a reasonable basis for it, and that the means are proportional to the end, the requirement would be allowed to stand. Evidence of its soundness would be difficult to present;
- with a child of pre-school age that he wishes to enrol in a French-language school: this condition is intended to enlarge the circle of supporters of the school to include potential users. It is not a redefinition of the classes in section 23. However, concrete means for identifying and controlling this category were not set out in the bill;
- with a child of school age with sufficient French language ability to be able to follow the program: in our opinion this condition is a classic example of a reasonable limit.

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56. Para 10(1)(c) and (2) of the proposal, see infra.

57. Para 11(1)(a) of the proposal, see infra.

(b) Board of trustees

The board would have the same powers as are set out in the Education Act for existing school boards.<sup>58</sup> Section 18 of the proposal expands its responsibilities with respect to religious instruction. It would be composed of three to nine members.

(c) Fransaskois board of education

The proposal contains the innovative proposal for the establishment of a French-language school board to manage all French-language schools in the province. The board would have at least three members, and at most a number equal to the number of French-language schools under its jurisdiction. The original members would be people who make up the provincial parents' organization, the Commission des écoles fransaskoises.<sup>59</sup> Members of the board would then be elected. The qualifications for entitlement to vote are described as follows:

- Canadian citizen aged 18 years on the date of the election;
- member of the parents' council.<sup>60</sup>

To be a candidate, certain conditions would have to be met; in addition, employees of the school board and persons who are not able to speak French fluently would not be eligible to be candidates.<sup>61</sup> People who are not members of a parents' council but who meet the other criteria are eligible provided that they may not form a majority on a board of trustees.

We have given our opinion on the parents' council. If the effect of using this concept for electoral purposes was to deny the right to vote or to be a candidate to people who would otherwise be entitled to French-language education under 23, it could be a denial of the constitutional right of such people, as recognized by the Court of Appeal of Ontario, to participate in managing the facilities their children attend. Moreover, the eligibility criterion relating to language could have the same effect, not to mention that it is discrimination on the basis of language. Language is not a prohibited ground of discrimination under section 15 of the Charter, but section 15 is not an exhaustive list, and it would be possible to challenge a provision imposing a language criterion on the parent. This provision will have to be rewritten, in the event the bill is to be used, to bring it into line with section 23. Is it a reasonable limit to require that a candidate be able to speak fluent French?

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58. Proposal, ss 6 and 17.

59. Proposal, s 2.

60. S 10.

61. S 11.

The Fransaskois board of education would have jurisdiction over the entire province, and would operate in French; this appears to us to be in accordance with 23.<sup>62</sup> It would have the powers of a regular board of education.<sup>63</sup> Except for the qualification criteria, the concept of the board of education is an original model, and is prima facie in accordance with the requirements of section 23.<sup>64</sup> This model arises out of the current situation, and brings together representatives of each of the several Type A schools. Management of these schools would be under the control of the members of the minority, and this provision complies with 23.<sup>65</sup>

## 2. Schools and programs

The proposal provides that French will be the language of instruction in schools under the jurisdiction of the Fransaskois board of education. A school is defined as educational facilities managed by the school board, with the objective of presenting programs that will encourage the preservation and development of French heritage, culture and society. Programs are defined in the same way. These provisions comply with the constitutional requirement for homogeneous schools, as provided in 23, and also with the cultural aspect of this guarantee, in accordance with section 27 of the Charter and the judgment of the Court of Appeal of Ontario.

The proposal gives the school board responsibility for establishing basic programs. This responsibility normally belongs to the minister, although the constitution is silent on the point. In our opinion, it would be more appropriate to an integrated structure to leave the job of developing programs to the OLMB, and authorize the school board to establish additional programs.

The proposal provides for two ways in which schools may be placed under the jurisdiction of the Fransaskois board of education: by transfer and by creating a new school.<sup>66</sup> The transfer procedure is intended for use with the five Type A schools and for any other institution if an application for transfer is submitted by the parents' council, the board of trustees or a school board. There are no criteria established for deciding what cases will be eligible for transfers, but given the structure set out in the proposal we would have to assume that a school would have to meet the definition of a Fransaskois school, since that is the only kind of facility over which the board of education would have jurisdiction.

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62. S 4.

63. S 15.

64. S 1, Act to amend the Education Act.

65. S 1, Part IX.

66. Ss 7-8.



The procedure for creating a new institution is the same as that set out in the Act, with some steps removed. An application is made to the Fransaskois board of education, which may approve it directly if it is satisfied that 15 pupils will attend the program over three consecutive years. If the application is not accepted, the parents may request transport free of charge, which the board must provide. An application may be made by the parents of 15 pupils; the parents must be of francophone culture and heritage and must communicate with their children in French. We have already stated our opinion on the matter of eligibility criteria. With respect to the numbers and the discretionary power, although they may appear reasonable on their face, this power would still be inoperative on the same grounds as the equivalent provision in the Education Act. Whether such powers are exercised by anglophones or francophones, they are discretionary, and the numbers are arbitrary; they would not necessarily meet the requirements of subsection 23(3)(b). Subsection 23(3)(a) is complied with, since the board must provide transport, even if for only one pupil.

### Conclusion

The Saskatchewan situation calls for a guarded conclusion. We have seen that history has prevented francophones in the province from developing their resources by being able to control their own education, so that their present situation is the result of a number of setbacks. The French-speaking population is scattered, and has access to only a very few French-language schools, each of which seems to have been designated only after a major struggle. Francophones often have to attend bilingual and immersion schools, mixed in with their English-speaking brothers and sisters, where they seldom have control over their own fate.

The Saskatchewan system, which has evolved out of the struggles of the parents and the recalcitrance of the authorities, contains significant problems, while at the same time it has some very positive aspects. We have set out in detail those elements that appear to us to be of doubtful validity.

The system is in fact so complex that it is difficult to relate each of its components to the Charter. Requests, studies by the school boards, ministerial decisions and the contents of the designation order are all disparate pieces of a jigsaw puzzle that, when put together, does not coincide perfectly with the constitutional model. The Charter sets out a fairly simple principle, although in practice it may be difficult to develop a coherent system based on that principle. It may be stated in one sentence: parents in Saskatchewan who meet the conditions set out in section 23 have the right to send their children to a French-language school wherever numbers warrant. The question here is how this

principle is reflected in all the parts of this system-designation, grades, Types A and B, requests, criteria for the various recommendations by the school board to the minister, the role and powers of the Lieutenant-Governor-in-Council, and so on.

The Act and the regulations are indeed specific; the discretionary powers provided are subject to major limitations; taken in isolation, each of the steps complies with the Charter, although with some unfavorable aspects; nonetheless, in our opinion, the Saskatchewan model taken as a whole does not meet the requirements of section 23. The inflexible implementation process, which limits the options to designating schools and allows for creation of only two types of programs, and which ties the entire system to the large school divisions, does not promote the ability of francophones in Saskatchewan to exercise their constitutional rights. The entire system is made non-functional by the combination of steps that it would appear must be taken every time a French-language class is to be added, or the list of courses offered in French is extended. This is not a reasonable limit in a democratic society.

We would note, however, that the Act, and more particularly the regulations, have grown more precise, so that few aspects contain such ambiguous and obscure elements.

But what should replace the legislation, if it is so precise? How can we criticize the legislature for doing exactly what we are asking be done - define everyone's rights and obligations clearly? We cannot do that, but we would like to see the system operate with the same clarity, and to have a system that would be simpler, quicker and more closely related to circumstances in the province. If a legal challenge were to happen in Saskatchewan, it might deal not with any specific provision of the Education Act, but instead with a request to change a Type B school to a Type A school without going through all the steps in the legislation but by going directly to the courts, relying on section 23 of the Charter and the slowness of the provincial administrative process.

In view of the judgment in the Vonda case, a court challenge may not be the ideal approach here. However, that case does indicate the importance of the legislative provisions in determining the approach the court will take. With the advent of the Charter, the situation has changed: it provides important grounds for a legal challenge, as well as for requesting legislative amendments. The first steps toward obtaining legislative change have already been undertaken within the French-speaking community in Saskatchewan.



**IX. French-Language Education Rights  
in Alberta**





Education rights in Alberta have developed slowly, although recent events do indicate an increasing receptivity in view of the newly entrenched rights to minority-language instruction in the other official language. However, just as in Saskatchewan, progress in Alberta is blocked by the inescapable demographic facts: there are fewer francophones than there are a number of other ethnic groups, they are scattered and split into small communities, and they have very little political influence within the province. But unlike Saskatchewan, which appears to have taken steps to remedy the situation, Alberta has enacted school legislation that bears little resemblance to the rights enshrined in section 23 of the Charter; the same is true of the Regulations that have been adopted. We must look to internal guidelines, letters from the minister and speeches to discover the substance of Alberta's requirements and policies on official language instruction. We will be examining these sources and the question of whether they are appropriate method of complying with constitutional requirements.

Alberta is preparing a major reform of the educational system for the next year. It is seeking to take advantage of this opportunity to reinforce legislative and regulatory protection for French-language instruction, and in order to attain this objective the minister of education has undertaken negotiations with the Association canadienne française de l'Alberta (ACFA). The minister's proposals amount to only a partial solution to the problem.

We shall follow the outline used for the other provinces: the fact situation, denominational schools, language education rights, related matters and conclusion.

## 1. Fact situation

The primary sources of information<sup>1</sup> provide only a partial picture of the French-language situation in Alberta. However, the information we do have leads us to guess that there is nothing to celebrate. Francophones account for 2.4% of the population, and are left in a very weak position. It appears that 31 school boards out of a total of 130, or 23%, administer French-language programs, including immersion. With respect to the schools themselves, 1981 data results (which may have changed since) indicate that if we combine public, separate and accredited private schools, 77 out of 1,500, or 5%, provide French-language courses. However, the data results do not show whether these are immersion, French as a first language or French as a second language. This 5% is a better reflection of the demographic reality in the province. Francophones are scattered, but there are a fairly large number in Edmonton and some concentration in the northern part of the province.

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1. CMEC Report, 1983; Rideout report.

The CMEC report notes that of this number, five schools may be categorized as unilingual French-language and 26 as mixed, with francophones and anglophones sharing facilities.

Out of the most significant characteristics of the Alberta system, which makes it difficult to attempt to describe its features, is the fact that no distinction is made between French as a first language and immersion, either with respect to the pupil population or with respect to the program. In addition, federal funds are available to schools that offer more than one hour of French per day in a subject other than French language and provide 25% of its total instruction in French-language courses. A school where 25% of the time is devoted to French can hardly be considered a "bilingual school," but the pupils and the institution are considered by the province to be studying at least partly in French, so that it is difficult to find institutions that are truly francophone.

Two French-language schools were recently added to this category. The school board in Calgary agreed to pay fees for francophone pupils who wished to attend a private French-language school - an arrangement that is of some interest to us here.

When the first French-language school in Edmonton, George et Julia Bugnet, had to be closed for lack of pupils and funding, the Catholic school board in Edmonton agreed to convert one of its schools into a French-language institution, and in its first year of operation more than 200 pupils enrolled.

## 2. Denominational schools

Before 1905, education rights in Alberta were under the jurisdiction of the Northwest Territories. When the Northwest Territories were created in 1880, the Northwest Territories Act<sup>2</sup> provided (section 10)<sup>3</sup> that the religious minority in a district retained the right to establish separate schools at their own expense. Section 17 of the Alberta Act, 1905<sup>4</sup> provided that section 93 of the BNA Act, 1867, applied to Alberta but with the following changes:

- nothing in any school legislation shall prejudicially affect any right or privilege enjoyed by any class of persons with respect to separate schools, by virtue of ordinance 29 and 30 of 1901;

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2. Today, RSC, 1970, c. N-22.

3. Today, par. 13(r).

4. 4-5 Ed. VII, c. 3 (Canada).

- in the distribution of funds by the legislature for the support of schools, "there shall be no discrimination against schools of any class described in the said chapter 29."

Not only were the rights of Catholics in Alberta preserved, but they in fact were given an additional guarantee of equal treatment in the distribution of public funds.

Since the existence of the Northwest Territories was established by law, there have been school ordinances providing varying protection for denominational schools, which has continued to exist up to the present. Legal challenges dealing with section 93 of the BNA Act, 1867, have been few. The right to denominational schools had been established well before there was an official provincial constitution.

The very first school ordinance in the territories dates from 1887. Before that date, it appears that schools were regulated by the municipalities. Ordinance No. 2 of 1887, respecting municipalities, refers to a school tax in section 52, authorizing the municipality to levy a property tax, in section 92 authorizing the municipal treasurer to act as treasurer of the school funds, and in section 155 on the municipalities' power to impose taxes. Before 1884, there was no specific legislative provision relating to the establishment or management of schools. Ordinance No. 5 of 1884 began by establishing a board of education, which at the time had 12 members - six Catholic and six Protestant - divided into two sections by religion. Each section had full responsibility for its own schools.<sup>5</sup>

In the area of religious dissidence, any number of residents could call a meeting for the purpose of forming a separate school. A petition to that effect had to be published, stating the number of children affected and the religion of the parents. At the meeting, trustees were elected and the borders of the school district were established. A report of the meeting had to be submitted to the Lieutenant-Governor-in-Council who, if he saw nothing to prevent him from so doing, issued a proclamation establishing the separate school district.<sup>6</sup> The new board then had the same rights and duties as a public school board<sup>7</sup> and the financial support to which it was entitled was calculated on the basis of the amounts paid by supporters in municipal taxes;<sup>8</sup> in short, separate school supporters' money went only to support their own institutions. On the other hand, religious instruction was forbidden in any school in

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5. Ss. 3-5.

6. Ss. 25, 27, 29.

7. S. 26.

8. S. 32.



the province between 9:00 a.m. and 3:00 p.m., and religious exercises could only be authorized by the school board.<sup>9</sup> We should also note subsection 15(1) of the ordinance, which provided with respect to notices:

Such notices may be either printed or written and must be in both the French and English language.

Ordinance No. 3, which appeared in 1885, brought a number of changes. The board of education was reduced in numbers by half, but the proportion of Catholics and Protestants remained intact.<sup>10</sup> The powers of the board as a whole included controlling, examining and teacher qualifications. The two sections reserved their control over their own schools, and could revoke teachers' certificates and adopt lists of authorized books. Public notices no longer had to be bilingual.<sup>11</sup> The only noteworthy change with respect to separate schools was that the Lieutenant-Governor-in-Council lost his discretionary power over the establishment of a district: he was required to establish a district if the vote taken at the meeting indicated the support of a majority of the voters present. In addition, in 1885 wider powers were given to inspectors with respect to the efficiency and effectiveness of the schools, compliance with the list of prescribed school books and examination of teacher candidates.

Ordinance No. 2, in 1887, brought a number of significant changes in the educational system in the territories, of which the most important were the following. The board of education increased to eight members, but for the first time Catholics were in the minority, with only three of the eight members.<sup>12</sup> The duties of the board as a whole included uniform inspection, examinations, granting certificates and classifying teachers, and most notably the responsibility for all schools that were not designated as Protestant or Catholic. The two sections reserved their control over their own schools and the right to appoint inspectors and examine teachers.

At this point, mere residents could not request the establishment of separate schools; for the first time, they had to belong to a religious minority of taxpayers within a district that was already established.<sup>13</sup> While school district borders could be changed upon request, section 42 put this power in the hands of the lieutenant-Governor. The duties of the school boards, including separate school boards, were set out in section 48, and included:

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9. S. 84.

10. S. 3.

11. S. 14.

12. S. 1.

13. S. 36.

- (1) Selecting a site, at or as close as possible to the center of the district;
- (2) hiring teachers;
- (4) constructing, repairing and renting facilities;
- (6) dismissing teachers for cause;
- (8) selecting school books from the list of books approved by the minister.

For the first time, the teaching of certain subjects became compulsory: reading, writing, spelling, arithmetic, geography, grammar, English and Canadian history, English literature;<sup>14</sup> as may be seen, there was no place for instruction in French. This provision reappeared in the 1888 revision of the ordinances, c. 59, s. 82. We shall pursue the history of this provision in the next section, since it refers to French-language education.

The most significant reform occurred in 1901. We find the origins of the First Alberta School Act<sup>15</sup> in the ordinances of that year.

The board of education was then five members, of whom two were Catholic;<sup>16</sup> it was responsible for examining and reporting on the regulations relating to inspection, the training and certification of teachers, and reference books. For the first time, there was a reference to public and separate schools. Section 41 et seq. of the Act of 1909 contained the same provisions for the formation of separate school districts that we saw supra. Any religious minority in a district was entitled to have its own separate schools. A request to this effect was to be signed by three residents and submitted to the minister. After a meeting was held and there was a vote in favor, the minister would establish the separate school boards for the district, with the same rights as the public school board. These sections remained substantially the same until enactment of the new School Act.<sup>17</sup> As well, in 1892 the teaching of French was authorized, but in practice was limited to one hour per day.

The provisions for denominational education have remained virtually unchanged until today. By virtue of section 52 of the School Act,<sup>18</sup> a minority of taxpayers in a school district who profess a different religion from the majority may establish a separate school. The request must be made by three applicants; a

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14. S. 83.

15. 1905, Can., c. 3.

16. S. 8.

17. RSA, 1980, c. S-3.

18. Ibid., c. S-3.

meeting of the members of this faith must be held and a secret ballot is taken. Section 53 provides that if a majority of electors votes in favor of the district, the minister shall establish it.

Once the district is established, all the residents in the separate school district of the same faith must support the separate school and not the public school. Sections 59 to 71 govern the procedures for taxation, the main features of which will be familiar: the religion of the resident determines where his or her taxes go;<sup>19</sup> a taxpayer cannot support both the public and separate schools;<sup>20</sup> a corporation may choose to support either of the systems in full, or each system in part according to the proportion of shareholders of each religion, but if the corporation does not give notice of its choice section 71 provides that its taxes will be directed to both systems in proportion to the enrolment in each.

It will be recalled that the constitutional guarantees for the denominational school system were entrenched in section 17 of the Alberta Act,<sup>21</sup> with some modifications. The Act provided that religious minorities retained their rights; subsection 17(1) was virtually identical to subsection 93(1) of the BNA Act, 1867, with 1901 as the reference date. Thus the rights that are protected in Alberta are, as in Saskatchewan, the rights guaranteed by the school ordinance of 1901,<sup>22</sup> and the school assessment ordinance.<sup>23</sup> These provisions have not been substantially altered by the Alberta legislature, but rather have been supplemented by later legislation.

There has not been an abundance of cases in Alberta dealing with denominational schools, except for a recent case dealing with the distribution of taxes collected.

There have been decisions dealing with the effect of the consolidation of small units into larger school districts. In Arregard v. Barons Consolidated School District<sup>24</sup> the Court of Appeal held that the responsibility for instruction and the conduct of schools after consolidation was transferred in full to the

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19. S. 59.

20. S. 52(1).

21. 1905, Can., c. 3.

22. RONWT, 1901, c. 29, ss. 41 to 45.

23. Ibid., c. 30, ss. 8 and 9.

24. [1917] 2 WWR, p. 302.

Consolidated District.<sup>25</sup> In Muirhead v. Bullhead Butte SD<sup>26</sup> it was held that the publication of a notice by the minister of the establishment of a district was conclusive evidence of its validity, despite certain irregularities in the manner in which the first meeting was called. In Morgan v. Mierzenski<sup>27</sup> the court stated that residence, for the purpose of the vote, was established on the basis of the ordinary place of residence within the division; when one fifth of a farm was in the district, this did not amount to residence. Moreover, residence is not the same as domicile.<sup>28</sup> When there is a consolidation, the residents of the districts that are consolidated become the electors of the new division.<sup>29</sup>

Decisions relating to religion in education are of greater interest, and we can observe the development in the case law. In R. v. Ulmer,<sup>30</sup> the Court of Appeal approved the requirement that children attend school. A student was attending a school that was neither Catholic nor Protestant, and the inspector of schools had refused to issue a certificate that the child was receiving an adequate education. The court stated that the child could be required to attend the public school in the district, and that the parent had to pay a fine; the court also refused to review the inspector's refusal. This decision can be contrasted with the recent decision R. v. Wieve,<sup>31</sup> in which 44 Mennonites had placed their children in a school that was not under the control of the school board and had not been approved by the superintendent. This time, the provincial court ruled that if the court could not review the decision of the superintendent there would be a violation of the principle of freedom of religion guaranteed in the Bill of Rights. Similarly, in R. v. Jones,<sup>32</sup> the provincial court held that the

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25. 1898 ordinance, c. 75.

26. [1911] 1 WWR, p. 253.

27. [1969] 1 WWR, p. 52.

28. Curren v. McEachen (1902), 5 Terr. LR, p. 333.

29. R v. Gainor, [1919] 1 WWR, p. 801; SA, 1915, c. 75, ss. 40a to 40h.

30. [1923] 1 WWR, p. 1.

31. R v. Wiebe, 1978, 3 WWR, p. 36.

32. (1983), 25 Alta. LR (2d), p. 359.



procedure adopted by the authorities violated the right to fundamental justice guaranteed by section 7 of the Charter. The minister of the church had refused to seek certification for a private school, arguing that his freedom of religion would be violated. The court stated that the school board should have inspected the premises and the program of study, and that the department should have presented substantial evidence showing that instruction was inadequate.

On the other hand, when the appropriate procedure is followed, the courts prefer not to interfere. This was the situation in Bouten v. Mynarski Park SD,<sup>33</sup> in which the plaintiff had first appealed his dismissal to the minister of education; this appeal was heard by a board of reference composed of a judge, in accordance with the Act. His appeal was dismissed, and he lodged a complaint with the Human Rights Commission. The Court of Queen's Bench held that the commission had no jurisdiction: the board of reference heard the allegations of discrimination made by the plaintiff and found that the dismissal was nevertheless reasonable. In Keegstra v. Lacombe Board of Education,<sup>34</sup> affirmed by the Court of Queen's Bench,<sup>35</sup> the plaintiff was dismissed because he preached false theories about the holocaust, against the directives of the school board. The plaintiff had been warned and had the opportunity to present his point of view, and so the dismissal was reasonable and the procedure followed provided guarantees of fairness.

In Schmidt v. Calgary Board of Education,<sup>36</sup> a Catholic who paid taxes to the public system wished to register his children in the public school without having to pay an admission fee. The Court of Appeal outlined the scope of the right to religious dissidence: the parent's religion will determine which school system the child will go to, and taxes must be paid to that system; if the parent wishes to send his or her child to the public system, the parent must then pay the registration fee.

Finally, two decisions have dealt with taxes. In Cochrane v. Rocky View School Division 41 Board of Trade,<sup>37</sup> residents of the city were taxed to cover part of the cost of school transportation despite the fact that they did not use the service. The Court of

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33. [1982] 5 WWR, p. 448.

34. (1983), 14 Alta. LR (2d), p. 370.

35. Not yet reported.

36. [1976] 6 WWR, p. 717.

37. (1980), 13 Alta LR (2d), p. 312.

Queen's Bench approved this practice: the primary goal of the Act is to apportion the tax burden for education equitably among all taxpayers in the division.

The decision in Calgary Board of Education v. Attorney-General Alberta<sup>38</sup> raises the question of the constitutionality of the Alberta School Act. Specifically, the school board was challenging those sections of the Act relating to the apportionment of taxes on corporations on a pro rata basis according to attendance, the ability of a person who was neither Catholic nor Protestant to support the separate school system, and the apportionment of grants in lieu of taxes.

The Court of Queen's Bench cited the Saskatchewan decision in Gratton in the Supreme Court, and specifically, the reasons of the two dissenting judges who limited the interpretation of subsection 93(1) of the Constitution Act, 1867 to protection of the minority, thereby supporting the opinion of the Court of Queen's Bench. Stevenson, J. concluded: "I come to the conclusion that ss (1) is protective legislation. It guarantees certain rights to the minority residents and the boards established by them and it does not lie in the mouth of the public board to attack legislation on the basis that its rights are prejudiced."<sup>39</sup> On the basis of this finding, the court refused to set aside the provisions challenged, which neither favor nor disfavor either system. The question is one of calculating and apportioning, which are certainly different from the methods used in 1905, but which are not unfair. There is no discrimination against the protected classes of individuals.

The Court of Appeal upheld this judgment, basing its decision on its interpretation of section 17 of the Alberta Act<sup>40</sup> and on the decision in Hirsch v. Protestant School Commissioners of Montreal.<sup>41</sup> The court stated: "In any event the clear purpose of section 93(1) and the section substituted for it in respect of Alberta, is to give constitutional protection to the rights of certain minorities, rights which had already been yielded by the majority, and not to give constitutional protection against these minority rights."<sup>42</sup> Thus a legislative amendment that does not directly affect the rights of religious minorities will be valid, regardless of its overall effect on the majority.

We shall now turn to the question of language rights guarantees in Alberta.

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38. (1980), 106 DLR (3d), p. 249.

39. P. 421.

40. [1905], Can., c. 3.

41. [1928] AC, p. 201.

42. P. 252.

### 3. Right of access to French-language schools

Although there has been a certain tolerance on the part of the authorities, there has never been any guaranteed protection of the rights of French-speaking Albertans. With the present rate of assimilation approaching 40%, this situation is clearly apparent. Since 1892, French-language instruction has been tolerated. It will be recalled that a list of obligatory subjects was set out, in 1887, in section 83 of ordinance No. 2. We would note here that the list specified the history of England, and English literature. In case the message had not been stated clearly enough, the revised school ordinance of 1888<sup>43</sup> added to the former provisions a new paragraph, as follows: "It shall be incumbent upon the trustees of all schools organized under this ordinance to cause a primary course of English to be taught." English thus became an obligatory subject in primary school, which was actually the only level at the time at which people went to school in significant numbers. In 1892, in ordinance No. 22 (new school ordinances appeared nearly every year during that period), section 83 reversed the tendency, and made it mandatory that all obligatory subjects be taught in English. By contrast, there was some openness demonstrated with the advent of instruction in French literature (which was, however, to be taught in English). Section 83, the precursor of the language of instruction provisions that prevailed in Alberta for a long time, read as follows:

All schools shall be taught in English in reading, writing, orthography, arithmetic, geography, grammar, history of Britain and Canada, French and English literature, in accordance with the program of studies prescribed by the Council of Public Instruction.<sup>44</sup>

Apart from this language requirement - making the provision cited above redundant, although it remained in effect in subsection 83(1) - there was the new provision that the council of public instruction would be responsible for the content of the program with respect to obligatory subjects. In 1896, the 1887 provision for language of instruction was changed to one quite different, clearer and more imperative: "All schools shall be taught in the English language but it shall be permissible for the trustees of any school to cause a primary course to be taught in the French language." We should note that in 1887 the minimum instruction in English had to be offered ("it **shall** be **incumbent** ... ") while ten years later instruction in French was neither "incumbent" nor even "lawful," but merely "permissible."

The School Act of 1952 was a first step on the road to the language rights that exist today.<sup>45</sup> In principle, all courses had

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43. C. 59, s. 82.

44. School ordinance, 1882, No. 22, s. 83.

45. SA, 1952, c. 80, ss. 382-383.

to be given in English only. A school district or division could authorize a primary course in French. In 1960, an ad hoc committee was given the responsibility of setting up a French-language educational program. In 1964, the Act was amended<sup>46</sup> and the use of French in grades 1 to 9 was authorized, but on a descending scale: grades 1 and 2 would offer one hour of English per day; grade 3, two hours; and from grade 4 on, French was limited to one hour per day.

Section 386 again permitted an entire primary course to be offered in French; the decision was to be made by the division board on the recommendation of the district board. Finally, section 387, which was seldom used, permitted parents who so desired to have the board hire a teacher at the parents' expense to teach in French outside normal school hours.

Before 1964, small school units made it possible for franco-phones to control the schools in the district. However, after that date, major decision-making powers were transferred to the large school divisions, which became responsible for all instruction in French. In 1968, some flexibility was introduced into the Act.<sup>47</sup> Permission to use French was extended to grade 12, and daily time for use of French was extended from one hour to half of the teaching time. For the first time, a Regulation was adopted,<sup>48</sup> and the courses that could be offered were set out along with the subjects in which examinations could be given in French.

In addition, provision was required to be made for students who requested instruction in English, by assigning classes to them or by authorizing them to attend another school.

In 1970, a new School Act was enacted. It delegated to the minister the power to make Regulations respecting English or French as the language of instruction. Districts were abolished, and replaced by local advisory boards. These boards could, inter alia, request by resolution that instruction be offered in French; the division board **had to** accede to this request insofar as it is possible. Sections 382 ss were replaced by sections 149 and 150, which were similar in content to their predecessors.

First, section 149 provided, subject to 150, that instruction would be in English. Section 150 provided that a board could authorize the use of French in any school, subject to the regulations. The new French language Regulation (287/70) repeated and extended the provisions of the earlier Regulation: the time of instruction in English was to be one hour per day in the first two grades, and 50% of the time thereafter. All examinations were to be held in either of the two languages, at the discretion of the minister.

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46. 1964, C. 82, s. 43.

47. SA, 1968, c. 89, s. 24.

48. Reg. 03/69, amended 20/69.



In 1971, the Act and Regulations were again amended; all languages other than English were placed on the same footing.

The next major amendment occurred in 1976, when Regulation 250/76 was adopted. To obtain a program in French, a division counsel must pass a resolution to that effect and notify the minister of the decision. The board must also demonstrate to the satisfaction of the minister that it has considered the interests of students who wish to continue to receive instruction in English. The courses and program of studies proposed must be approved by the minister. The 50% requirement for English was removed; English was required to be taught one hour per day for grades 1 and 2, decreasing gradually thereafter.

In 1978, a policy statement was added to these provisions. If a local advisory board so requests, a school board is required to provide a French-language program.

French may be used for all subjects. However, English-speaking students who wish to follow this program may be included. There are four kinds of programs: core, extended, bilingual and immersion. Only the first program is instruction in French as a second language, for one hour per day. The second program, extended, refers to a program that includes more than one subject taught in French; the third program is taught 50% in French; and the fourth type of program includes any program in which French is used more than 50% of the time. The three last-mentioned programs are eligible for special financing.<sup>49</sup> The department will defray the base costs of the school boards.<sup>50</sup>

The present situation is thus as follows. Sections 158 and 159 of the School Act<sup>51</sup> are the only provisions, together with the regulatory power delegated to the minister in sections 12 and 27 respecting advisory boards, that deal with the education rights of French-speaking Albertans.

Section 158 establishes the principle: subject to 159, all pupils in Alberta must receive their instruction in English. Section 159 indicates that a Board **may** authorize the use of French, or any other language, as a language of instruction. The board must comply with the minister's Regulations, and courses of study must be in accordance with the Act and Regulations. Finally, subsection 159(3) authorizes the board to hire a person or persons to give courses in French or in any other language, if the parents so request.

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49. Reg. 171/76 and Alta. Ed. Grant Order, 1981, Part X.

50. Administration, maintenance, operation, transportation up to a maximum, instruction; Reg. 208/82.

51. RSA, 1980, c. S-3.

Regulation 490/82 requires a board that wants to offer a program using French to adopt and submit to the minister a resolution authorizing the use of French as a language of instruction, and to ensure to the satisfaction of the minister that pupils, whose parents want them to receive instruction in English who would normally attend such schools, will be satisfied. French-language programs and courses shall be those prescribed or approved by the department.

Section 2 of the Regulation establishes the proportion of English. In grades 1 and 2, it is at the discretion of the school board. In grades 3 to 6, there must be 300 minutes of English language arts per week; in grades 7 to 9, 150 hours per year; and in grades 10 to 12, 125 hours per year or five credits per year.

Do these provisions taken alone comply with section 23 of the Charter?

This question must be answered in the negative, given the decision of the Court of Appeal of Ontario in the ACFO case. If the departmental policies and directives did not exist, the Act and regulation alone would not set any mandatory standard. First, the provision in section 158 that English shall be predominant violates the spirit of the Charter, as set out in subsection 16(1), that the two languages have equality of status and equal rights and privileges. An easy solution to this problem would be to amend section 158 to include French; such a change would provide more tangible support for legal claims.

The provisions in the Act for access to French-language instruction are not comparable to the provisions of the Charter.

- the Act gives a school board the absolute discretion as to whether it will establish a program using French, while the Charter confers a right;
- the Act does not specify what program is covered by a school board decision: it could be any one of the four programs established by the department. None of these four - not even immersion, which is still a second language program - meets the criteria of the Charter;
- the Act does not specify number or geographic area; it appears to presume that only the schools already in existence can be used. We must look to the Constitution, with its mandatory criteria, to speak where the legislature has been silent; the role of the Act should be precisely to clarify the criteria in the Constitution;

- the Act does not specify the population to be covered by the program; government policy includes freedom of choice. The Charter does not guarantee free choice in the language of education: it gives rights to a class of people. If freedom of choice would result in a loss of these rights, it would violate the Constitution;
- the Regulations simply provide minimum procedures and a minimum amount of instruction in English. There is no limit on the complete discretion of the school board.

We therefore believe that the Act and Regulations are inoperative, because they are inadequate and incompatible with section 23. The Alberta legislature's silence makes the Act unconstitutional: it has not exercised the responsibilities imposed on it by the Constitution. As a result, decisions may be made in individual cases at the discretion of the school trustees.

The drafters of our Constitution did not intend that systems that provide for such discretionary powers would be allowed to persist under the Charter. The Alberta legislature will have to remedy this situation, or it will be necessary that the courts take the required steps to re-establish equality of status between the two languages.

The whole range of tools available to francophones includes directives, letters of clarification and policy statements. These are also the documents where we find more details on the Alberta attitude toward educational rights. In 1978, following the St. Andrews meeting, the Government of Alberta issued a first policy statement. It noted the diversity that existed among situations in the various provinces, and recognized that francophones would be able to receive instruction in their language, but at the discretion of the division school boards or of local advisory boards, where they are in existence. In addition, the statement made it clear that French-language instruction in Alberta would be offered to any resident who sought access to it: "It will continue to be our policy to allow admission to French-language programs regardless of mother tongue."<sup>52</sup> The statement goes on to confirm the refusal of the government to make formal legislative provision for these policies, although it would continue to facilitate French language instruction through program development and funding.

In 1980, the Government of Alberta indicated that it would be increasing transportation grants, and that it was maintaining the funding level for French-language instruction at the level that existed prior to the adjustment in the method of calculating the federal grant.

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52. Statement, p. 2.

On November 19, 1984, the minister of education sent a letter to the school boards, in which he indicated his support for section 23: "The Government of Alberta supports section 23 of the Charter of Rights and Freedoms and is prepared to ensure, through co-operation with local school boards, the development, the implementation and the assessment of French language educational programs which are appropriate to the needs of the students."<sup>53</sup> The letter confirmed the government's intention to offer such programs to anyone who was able to follow them, regardless of whether he or she met the criteria in section 23.

Finally, the department produced a draft policy, which was written in terms clearer than the provisions in the Act. It opened with a dual statement of principle:

- Alberta **guarantees** to parents who are eligible under 23 that their children will receive instruction in French;
- Alberta will ensure that children of parents who are not eligible under 23 have the opportunity to receive instruction in French.

There is a program directive intended as a guide for school authorities who want to establish French-language programs. A distinction is made between a French program, intended for children of parents who qualify under section 23 of the Charter, and an immersion program. However, there is very little difference in the content of the two programs.<sup>54</sup> There remains also the question of the legal status of a directive. We could, however, develop an argument based on sections 24, 32 and 52 of the Charter that directives must be subject to constitutional provisions.<sup>55</sup> In any event, legislative amendment to comply with section 23 is preferable to a directive, even though the provisions of some directives appear similar to regulation.<sup>56</sup>

#### 4. Administrative and related matters

In 1978, when the government issued its first policy, the Language Services Branch was created. Although it has responsibility for all language programs, it is charged with developing and promoting French-Language and French as a second-language programs;

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53. Letter from the minister of education to the school boards, personal documentation.

54. See Implementing, Monitoring and Evaluating French and other language programs, program development and program delivery divisions, language services branch, 1984-09-14.

55. Section 24 provides a method of enforcing the Charter, and a remedy for violation, regardless of the source of the violation; section 32 provides that the Charter applies to legislatures and governments; section 52 provides that the Charter prevails over any other law.

56. Cf., Garant and Issalys, Loi et Règlement, a publication of the Laboratoire de recherche sur la justice administrative, No. 3, 1980.



in practice, the branch's efforts are devoted mainly to the French programs. Other branches in the department participate sporadically in the francization effort: for example, the Field Service Branch hired four teaching advisers with responsibility for assisting school boards in providing programs in languages other than English; the student evaluation branch has staff who are responsible for developing assessment methods in French; and specialized services in the department comply with requests from the language services branch.

The powers of the minister are exercised through regulation. Section 11 gives the minister the following responsibilities:

Subsection 11(1)

- (a) English as language of instruction;
- (b) French as language of instruction;
- (c) any language other than English or French as language of instruction;
- (d) inspection of pupils, teachers, schools, programs and courses of study;
- (f) inspection of schools for the purpose of ensuring that the Act and Regulations are complied with;
- (g) examinations;
- (k) dissolution of school boards;
- (m) payment of grants in lieu of transport;
- (n) payment of maintenance grants to pupils.

Subsection 11(2)

- (a) prescribe programs, courses and instructional materials;
- (b) approve in writing programs submitted by a school board.

Subsection 12(1)

- (a) the minister may delegate powers under section 11 to a school board.

The province is divided into districts, with some districts being grouped into a division. Sections 13 and 14 provide that the minister may, at his discretion, establish districts and divisions. Two or more school boards may establish a regional district.<sup>57</sup> The minister is empowered to add land to or take land from a district, transfer schools from one district to another and subdivide districts.<sup>58</sup> When a district is included in a division, the school board trustees automatically become a local advisory board,<sup>59</sup> or if there is no school board in existence three electors may petition the minister to call a meeting to elect a local advisory board.<sup>60</sup> The local advisory board has three powers: to request religious

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57. S. 23.

58. Ss. 17 and 18.

59. S. 15.

60. S. 26.

instruction or instruction in French; to nominate a teacher; and to advise the school board on any matter that the board may delegate to it. It should be noted that if the local advisory board requests that a French-language program (of whatever nature) be instituted, the school board must institute the program as soon as it is practical to do so.<sup>61</sup> In addition, for school districts that are not included in divisions, a board of trustees is elected,<sup>62</sup> and has powers identical to those of the school board.

A school board has the following specific responsibilities:

Subsection 72(3):

- (b) maintain and repair its property;
- (d) make rules for the administration and operation of schools, school buildings, dormitories and buses, subject to contracts of employment;
- (e) settle disputes between teachers and parents.

The powers of a school board in Alberta are comparable to those of boards in other provinces:

- (g) make grants to another school board or organization involved in educational activities;
- (j) purchase material and supplies; and
- (k) distribute them to pupils.

Subsection 83(1):

- Transfer teachers from one school to another or from one classroom to another.

Subsection 102(1):

- Acquire and dispose of real and personal property for educational purposes.

Subsection 103(1):

- Agreements with the approval of the minister between a school board and another board, or a municipality, for the joint construction and operation of a school. (Note that the minister may make regulations respecting the construction and maintenance of schools: subsection 108(2).

In addition, with the approval of the minister, a school board may enter into agreements:

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61. S. 27.

62. Ss. 29 et seq.

- (a) with any provincial, federal or municipal government, or with another school board or a private institution, for provision of educational services;
- (b) with a federal government for provision of educational services for the children of Indians or military personnel;
- (c) with a board of trustees in another province for providing educational or administrative services;
- (d) with a school board in another division for the provision of educational or administrative services to the pupils of one or more district, under subsection 103(2).

A school board is required to accept any pupil (defined in section 142 as a child between six and 16 years old) whose parents reside in the district, or direct the pupil to another district,<sup>63</sup> in which case the school board shall be responsible for the child's fees;<sup>64</sup> however, the board to which a pupil is directed shall accept the pupil only if it has sufficient accommodation. A school board may also choose to pay for the education of a pupil in a private institution recognized by the department.<sup>65</sup> These provisions could be used when a school board does not provide instruction in French.

A parent may also ask a school board in a district where the parent is not resident to admit his or her child; if the school board to which application is made has sufficient accommodation and the parent or referring school board agrees to pay the fees, the school board to which the application is made shall accept the pupil.<sup>66</sup> Fees are not payable for instruction provided by the school board where the parent is resident in the district,<sup>67</sup> but a school board is entitled to charge fees to a non-resident pupil, such fees being the equivalent of the average cost of education for residents.<sup>68</sup>

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63. S. 145(1).

64. S. 145(2).

65. Par. 145(4)(b).

66. S. 151.

67. S. 152(1).

68. S. 151(2).

The school board may close a school and transfer the pupils to another school, with the approval of the minister.<sup>69</sup> The board may use this power to provide separate educational institutions for French-speaking residents, by transferring pupils from one building to another.

A school board is required to provide transport for pupils who reside more than 4.8 km from the school; a board may comply with this requirement by providing transport on a route that is 2.4 km from the parent's residence. The board may charge a fee for this transport.<sup>70</sup> A board may contract with the parent of a pupil to have the parent transport the pupil and to pay the parent.<sup>71</sup>

This review has set out the substance of the Alberta provisions for administration of the school system. It will be noted that the system gives the appearance of being flexible, and that the legislature appears to have made provision for adaptation to local conditions.

All the legal powers conferred on the minister or the school boards result in very broad discretionary powers at both these levels. There may be agreements, transfers and resource sharing, but there are very few specific obligations imposed on the school authorities. Specifically, the provisions respecting transfers of pupils require the addition of an obligation to provide education in French for any child whose parents meet the criteria in section 23 of the Charter. If a board of education is not able to fulfil this responsibility, sections 103, 145, 151 and 165, respecting transferring pupils and transport, would provide an acceptable course of action for a school board. However, these provisions are not drafted so as to comply with section 23 of the Charter, and could result in quite unacceptable arrangements (such as pupils being transported for many kilometres); for this reason, amendments are required to provide specifically for instruction in French.

## Conclusion

The attitude in Alberta might be described as timid, at the very least. The Act contains no formal or concrete guarantees; there are no obligations imposed by the Regulations. Everything appears,

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69. S. 149.

70. S. 165.

71. S. 166.



in fact, to be left to the discretion of the school board. Even when a local advisory board demands French-language programs, the school board need not comply unless it is possible for it to do so. The department's directives show greater openness, but since they have only sub-regulatory legal status they have no real authority. There is a clear gap between the government's intentions and the tangible rights granted by the legislature. The department's programs do not yet provide for a recognized place for French as a first language, and the highest position now provided for French is immersion programs. The eligible student population for French-language programs still include children whose parents do not qualify under 23. The emphasis appears to be on freedom of choice.

Given this failure to meet the province's responsibilities by enacting legislation, and as well the doubtful force of a directive, Franco-Albertans will be forced to rely on section 23, which fills the void left by the legislature, and which we can expect to be interpreted judicially as may be necessary. Francophones have turned to the courts for declarations of their rights, and armed with these declaratory judgments they will be able to require that the legislature accept its responsibilities and provide concrete rights by legislation. ACFA<sup>72</sup> is seeking an "Albertan solution" for implementing 23 in this province, and has for some time been negotiating with the minister, but with very little progress to date. On the other hand, a resounding judicial success like that won in Ontario could set off a backlash in a province that has a much smaller proportion of francophones. In any event, Calgary and Edmonton each has a French school already. What remains to be settled is the fate of smaller, more isolated French-speaking communities. Franco-Albertans need to find appropriate ways of extending and managing the French-language school system.

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72. News release, November 26, 1984.

**X. French-Language Education Rights  
in British Columbia**



British Columbia has one of the smallest French-speaking minorities of any province in Canada. Nonetheless, there have been recent efforts resulting in measures to protect the educational rights of this minority, which we will be considering here. Francophones clearly do not have the same level of protection as in New Brunswick, for example, and there undoubtedly remains much to be done in French-language education in British Columbia. Some people will perhaps find this progress too slow, but it cannot be said that the situation has stagnated. We must remain hopeful that in the near future Franco-British Columbians will have full access to quality French-language education.

We shall first look at the fact situation in the province, and then briefly consider the history of denominational schools before taking a closer look at provisions for French-language instruction.

#### 1. Fact situation

The French-speaking population of British Columbia increased only very slightly from 1976 to 1981, from 1.6% to 1.7% of the total population of the province. One-third of this population is concentrated in Vancouver, while the remainder is dispersed throughout the province. The CMEC report indicates that there has been an absolute decrease in the number of pupils attending schools where instruction is given in French, from 839 in 1976-77 to 785 in 1981-82. The first number, however, indicates children in immersion courses, which was the only program available at the time, while the second number indicates children in programs using French as a first language, not including immersion. Twenty-three of 75 school districts operate at least one French-language class. There has also been a continuing increase in the numbers of children enrolled in immersion programs.<sup>1</sup>

In addition, one single school offering courses entirely in French was opened recently: Anne Hébert school in Vancouver. This school serves about 150 pupils in the seven primary grades. Other schools either offer courses in French and English or offer French immersion courses. The composition of these classes may vary, since admission criteria are within the jurisdiction of the school boards, and are not applied uniformly. It is not unusual to find French-speaking and English-speaking children in the same class. The French-language program of instruction is not yet available at the secondary level because there are not enough students, according to education authorities. Finally, Franco-British Columbians are not themselves totally convinced of the merits of French-language instruction, some preferring the bilingual instruction offered in

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1. 1982, LOE profile, p. 14.



immersion classes. A group of parents who are convinced are working to raise the consciousness of francophones and urging them to support the French-language program.

## 2. Denominational schools

The constitution of British Columbia includes no protection for denominational schools. With the exception of whatever private schools there may be, the public system is non-denominational and recognizes no right of dissent. Section 164 of the School Act (RSBC, 1979, c. 375) explicitly sets out the rule:

164. All public schools shall be opened by the reading, without explanation or comment, of a passage of Scripture to be selected from reading prescribed or approved by the Lieutenant-Governor-in-Council. The reading of the passage of Scripture shall be followed by the recitation of the Lord's Prayer, but otherwise the schools shall be conducted on strictly secular and non-sectarian principles. The highest morality shall be inculcated, but no religious dogma or creed shall be taught.

This provision, taken together with section 113(1), which makes attendance mandatory, results in a certain infringement on religious freedom. In Perepolkin v. Superintendent of Child Welfare<sup>2</sup> the validity of the section was attacked. The Court of Appeal of the province rejected the argument, the majority finding that section 93 of the Constitution Act, 1867 gave the province the exclusive right to legislate in relation to education. Subject to any protection provided, which did not apply in British Columbia because there was no legislation guaranteeing religious education before the province entered Confederation, any schools legislation that indirectly affected religion would nevertheless be valid. Legislation making school attendance mandatory did not infringe on the rights of a religious sect which challenged that provision for reasons of religion. Sheppard, J. stated:

Under the circumstances of this case the general powers of legislation conferred by section 93 are not limited. Those general powers are not limited by the "Terms of Union" nor by legislation under section 146 of the BNA Act which provides for the admission of British Columbia and other colonies ...

Therefore in the circumstances of this case the general powers of the province to legislate on education under section 93 must be taken to be unqualified. By reason that the appellants have not established any special right limiting the powers of

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2. (1957), 23 WWR, p. 592; 11 DLR (2d), p. 417.

the Province, therefore the statutory provisions in question must be taken to be within the legislative powers of the province ...; and being valid such provisions are effective to exclude a right of the appellants to withhold their children from school.<sup>3</sup>

### 3. Access to French-language schools

Neither the Act nor the regulations provide guarantees of access to French-language education. The situation is similar to that in Alberta, where the very general provisions of the Act do not actually appear to provide any concrete rights. Here, since there is no applicable legislative provision, we must go back to the two more remote sources of the law: the Constitution, which is supreme and prevails over other legislation, and guidelines, the legal effect of which leaves much to be desired. The primary measures for French-language instruction in British Columbia are found in this latter category of document.

In 1981, the government of British Columbia issued a fairly complete policy statement on the question, which is commonly known as Circular 146. This policy provided for implementation of three programs: the programme-cadre de français (French-language core curriculum - PCDF), early immersion and late immersion.

The general policy statement is somewhat similar to Alberta's. The preamble to Circular 146 states that the government of the province will make it possible for parents to have a choice in the language of instruction for their children; thus freedom of choice is an official government policy.

The circular then describes the three programs in relative detail. For the purposes of this study, we shall consider only the two categories of PCDF and immersion.

The PCDF is intended primarily for francophones, and this policy is stated clearly in the directive: "It is not an immersion-type program for non-francophone students wishing to learn French as a second language. The PCDF parallels the English Language Core Curriculum in its content, kindergarten through grade 12."<sup>4</sup> We shall see that despite this firm statement of principle the reality of the situation is far from this ideal.

There are four sections after this preamble. The first deals with establishing a class, the second with admission of non-francophones, the third with the program and the fourth with teachers. These are the provisions that must be compared to section 23; since there is no legislation, the policy guideline is the basis for establishing French-language classes in British Columbia.

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3. P. 428.

4. Circular 146, p. 2.

A school board must establish a class in any school district where there are 10 students of elementary school age whose parents have requested enrolment. The board has no discretion in this situation. If there are fewer than 10 students, the school board must request the minister to consider providing the program in any case as an exception. Since a class may include all grades in the elementary school, it will be relatively easy to find 10 pupils in grades 1 to 7 in a district; however, the problems of teaching such a group can be imagined. The choice of schools where classes will be established is in the discretion of the school board; however, the circular does specify that it is preferable that the choice be convenient to a majority of students in the program. If there is no space available, additional classrooms may be provided, but it is preferable to have the students in kindergarten to grade 7 in one school. If travel is required, the local regulations governing transportation apply. Finally, school districts must inform the parents of the existence of the program each spring, and registration will take place after that time, including July and August.

Before we compare these provisions with section 23 of the Charter, we should refer to the second paragraph, respecting admission of non-francophones. This second paragraph of Circular 146 (which is composed of one section only) provides that where a non-francophone child has already followed a program equivalent to the PCDF or immersion, and immersion at his or her grade level is not available in the school district, he or she may be admitted to the PCDF. The additional costs of the PCDF will be paid by the province, while the costs for immersion must be paid in part by the school board; as well, establishment of the PCDF is mandatory (when the specified conditions are met) while immersion remains optional, and at the discretion of the school board. These two factors together have in some cases convinced a school board to establish PCDF classes only at the higher grade levels, and to rely on paragraph 1.2 of Circular 146 and admit anglophone children who have completed early immersion as well as francophone children, thereby creating bilingual classes and encouraging both poorer quality teaching and rapid assimilation.

When compared to the constitutional provisions of section 23 these provincial measures, while appearing valid, present definite problems, similar to those that we have noted in the other provinces:

- The required number, 10 students in seven grades, does not appear unreasonable, but it was established arbitrarily and would not withstand challenge.<sup>5</sup> In addition, grouping seven grades in a single class under the supervision of one teacher appears to us to be unrealistic from a teaching point of view,

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5. Re Minority-Language Education Rights (1984), 10 DLR (4th), p. 496.

although this situation should not occur too frequently. The school board undoubtedly prefers classes that are more homogeneous in age and grade, even if they have to group francophones and anglophones together.

- The school board has the broadest discretion in choosing the school where the class will be located, and such complete discretion is contrary to the Constitution. There should be criteria laid down to guide the school authorities.
- There is no provision for grouping classes together to create a school, while the Charter provides for homogeneous schools where numbers warrant. This provision applies to Franco-British Columbians as well.
- Admission to the PCDF cannot be restricted to francophone children; it must include the three categories specified in section 23. These categories, however, do not include students described in paragraph 1.2 of Circular 146; non-francophone children who have already followed an immersion program cannot, in our opinion, fulfil the criterion set out in subsection 23(2) of the Charter, and their eligibility for the PCDF should depend solely on their parents' qualification under 23(1) of the Charter.
- Transportation should not be left to the discretion of the school boards. If it is, the result will be inequity and unfairness with variations among districts. Rules respecting transportation for francophone pupils should be made specific and should promote the grouping of such pupils in homogeneous schools. Transportation should be financed entirely from public funds.
- Complete freedom of choice in the language of instruction presents problems of disparities within classes or schools. French-language schools should be protected by special measures.
- School boards should not be able to provide only such additional facilities as they may choose; it must be specifically provided that the quality of these facilities must be comparable to those provided to the majority.
- There is no provision for a local committee, an advisory committee or any other form of consultation, let alone of management, of French-language classes or schools. The Charter guarantees the right to manage education. This omission should be corrected in the very near future; at the very least, advisory committees with full powers over matters relating to French-language education should be established.



Overall, this part of British Columbia's Circular 146, respecting admission to the PCDF, does not meet the obligations set out in section 23 of the Charter. Greater emphasis is needed on homogeneity of language in classes and schools.

The third part describes the program, which is supposed to be different from an immersion program. Paragraph 1.3.1 provides that it will meet the needs of francophone students and entails "a very in-depth cultural content equal to that taught in French schools outside British Columbia." Both the program and the teaching material will be provided by the ministry. It is also expected that schools will develop a system of evaluation and reporting in French.<sup>6</sup> Finally, the circular states the intention that the use of French will be honoured and encouraged:

1.3.6 It is understood that francophone students and teachers will participate in the life of the school and whenever possible activities will be in French. Activities held in French can be beneficial to all students in the school.

The objective set out in 1.3.6 will be difficult to meet in the kind of school where these classes are to be established. In addition, the intention to inject a cultural content into the program, equal to that taught in French schools outside the province, cannot be put into practice in this context. The Court of Appeal of Ontario gave special consideration to the cultural and community nature of the French schools guaranteed by the Charter; it could be argued that the judgment and a liberal interpretation of the Charter indicate that this cultural aspect is part of the constitutional guarantee, if we consider also section 27 of the Charter. What is needed is more than French activities in bilingual schools, and more than textbooks and courses in French. What is needed is for French-language instruction to reflect the cultural dynamics of the Franco-British Columbian community, and for the school to contribute to the development of this community.

The fourth section deals with teachers; apart from the normal requirement that they meet the eligibility criteria for all teachers in the province, the circular specifies that "it is highly desirable that teachers in this program be Francophone," and that "it is essential that their oral fluency as well as their written competence be that of a native speaker of French." However obvious this requirement may be, it has not been applied evenly throughout the province; this was seen in the case of Mr. Ethier, who was accused of having violated the teachers' code of ethics by challenging the language competence of an anglophone colleague who was teaching Mr. Ethier's child in French. The ministry has limited legal means of ensuring that school boards comply with this directive. The constitutional guarantee contained in section 23 of the Charter,

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6. Par. 1.3.4

however, presupposes that the teachers providing French-language instruction should be capable of performing this task adequately, and section 23 should therefore offer a remedy for this problem notwithstanding the provisions of Circular 146.

If we compare the provisions for the PCDF with those for immersion, we find that there is little difference between the two programs. Early immersion is designed primarily for non-franco-phones; there must be 20 resident students for a class (without qualification - francophones may therefore be included in the 20), and it is in the discretion of the school board whether a class is established. The program will begin in kindergarten or grade one, and continues to the subsequent years, presumably with no numerical requirement. French-language instruction time in grades 4 to 7 should at no point be less than 50%. Late immersion is intended to provide passive bilingual ability. Twenty-four students are required and the program, which covers grades 6 and 7, is discretionary.

Financing for additional costs involved in establishing the PCDF is provided by the ministry. School boards must prepare their extraordinary budgets for these costs and submit them for approval by the ministry. In this way funds intended for the PCDF are identified and there is more effective control over expenditures.

Financing for additional costs associated with immersion programs is also provided, but since the pupil/teacher ratio must be similar to that of the regular program, the ministry expects that the costs will remain fairly low.<sup>7</sup>

The financial reform of the educational system undertaken in 1982<sup>8</sup> will have only a limited effect on the PCDF, since the PCDF is mandatory under the guideline. As well, subsection 2(3) of the Act, cited above, authorizes the minister to pay the additional costs resulting from the provision of services in circumstances that are outside the control of the school boards - such as, for example, the mandatory establishment of a PCDF.

Circular 146 is therefore the only positive source of standards for French-language instruction in British Columbia. Although its provisions are progressive, and it contains only a few that would raise questions of constitutionality, it might be hoped that there will be some legislative declaration to provide for reforming, improving and safeguarding the rights of francophones in a more tangible and permanent manner.

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7. Rideout report, p. 23.

8. 30-31 El. II, Law 27.

#### 4. Administrative and related matters

While there is no provision in British Columbia legislation that would confer rights on the French-language minority, there is paradoxically precise provision for the details of administrative organization.

At the departmental level, the operation of the PCDF and of immersion programs comes within the jurisdiction of the Modern Languages Services Branch, which is responsible for establishing programs and providing textbooks.

Since 1984, there has been a full-time co-ordinator specifically responsible for the PCDF. Apart from his considerable financial powers, the following powers - which are relevant to our considerations - are conferred on the minister by the Act:

- s. 4(1)(b) supplying books;
- (d) supervising all schools - responsibility assumed by the superintendent, infra;
- (e)&(f) the minister may authorize or require a school board to open or close a primary or secondary school, in accordance with the regulations;
- (i) in the event of failure or inability of a school board to select a school site, the minister shall do so, subject to the approval of the Lieutenant-Governor-in-Council.

Section 6 of the Act sets out the powers of the superintendent; among them, we would specifically note that the superintendent shall determine the responsibilities and assignments of teachers within a district, transfer teachers from one school to another, advance standards of instruction by providing continuing instruction for teachers and principals; where necessary, he recommends which school a pupil should attend,<sup>9</sup> and with the approval of the school board, he designates school attendance areas. These powers could be used to create and maintain a French-language school and to determine what pupils it would serve.

Creating school districts and defining their boundaries are the responsibility of the Lieutenant-Governor-in-Council. However, the Act does place one condition on this power: a district shall not be created unless there are at least 10 children of school age available to attend a public school resident therein.<sup>10</sup> This number is the same as the minimum number of pupils required for the PCDF; if necessary, subsection 13(2) could be used to create a school district including only 10 French-speaking children. However, subject to this very low minimum requirement, the power to create school districts is

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9. Pars. 6(1)(e), (f), (g), (h), (n).

10. Ss. 13(1) and (2).

solely within the discretion of the Lieutenant-Governor-in-Council, who may also determine the number of trustees - three, five, seven or nine - to be on a school board.<sup>11</sup> A school board is a corporation with jurisdiction confined to the school district, unless it is extended by statute.<sup>12</sup>

The Lieutenant-Governor-in-Council has a general and unrestricted power to make regulations;<sup>13</sup> the legal validity of this provision would appear to be in doubt, since general clauses of this nature tend to be given a cool reception by the courts.<sup>14</sup> There are further sections which clarify and add to this general delegation. We would note in particular the conditions under which a school board can be authorized or required by the minister to open or close a school, classes of teachers' certificates, prescribing courses of study and textbooks, and authorizing supplementary readers and other instructional material.<sup>15</sup>

The school boards have a number of powers and responsibilities that could be used in implementing section 23 of the Charter.

- s. 119 - after considering the recommendation of the superintendent, appoint teachers and assign them within the district;
- s. 120 - transfer teachers from one school to another;
- s. 155(1)- provide school accommodation and tuition free of charge to school age residents in the district;
  - after considering the recommendation of the superintendent, divide the district into areas for the purpose of assigning pupils to various schools;
- s. 157(1)- make an agreement with another school board to send a pupil resident in the district there, or to accept a pupil resident in another district; the agreement must fix the amount to be paid for school accommodation and tuition, not to exceed the cost to the board for each pupil;
  - pay the cost of transportation for a pupil;

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11. S. 22.

12. Ss. 80(1) and (4).

13. S. 14.

14. Garant and Issalys, Loi et règlement.

15. Cf., ss. 15(a) and (e).



- where a pupil is compelled to live away from his family home to pursue his education and no dormitory facilities are provided, defray the cost of lodging;
  - if the pupil lives in a school district designated by the minister, assist in paying the cost of transportation and lodging outside the province;
  - provide and defray the cost of transportation for pupils residing in a part of the district that is a considerable distance from the school;
  - provide dormitory accommodation at reasonable fees for pupils for whom transportation is not practicable; admit to the dormitory pupils from other districts;
- s. 160 - admit pupils residing outside the district, on payment of prescribed fees;
- s. 165 - approve courses of study and supplementary readers;
- s. 168 - select a site for a new school, with due consideration for all pertinent information and advice; enter into agreements with municipalities in the school district for constructing a school or for joint use of facilities.

Overall, the British Columbia system appears at first glance to be somewhat more centralized than other provincial systems. The minister or the superintendent seems to be able to exercise quite detailed control over school boards and schools. The provisions that we have cited confer on school boards and departmental authorities all the necessary powers to create French-language schools if they wish to do so; the only thing missing is a legislative requirement that they do it. Nevertheless, if a school board were required to comply with demands for French-language instruction, it would have available to it all the powers needed for compliance.

### Conclusion

British Columbia is similar to the Yukon and Newfoundland, in that there is no legislative provision for the exercise of the rights conferred by section 23 of the Charter; each decision, and the development and implementation of policies adopted, being left to depend on the circumstances of each case. There is a departmental policy guideline that attempts to provide some basis and direction for school board decisions. We have noted the weaknesses in this guideline; nevertheless, we believe that it would be dangerous to challenge the guideline on the basis of the Charter, depending on the meaning that should be given to the expression "law" in subsection 52(1) of the Constitution Act. This does not mean that Franco-British Columbians have no remedy available to them; on the contrary, they could rely on the guideline, which has mandatory effect on

administrative authorities within the department, and rely on section 23 of the Charter to enforce their rights. This process could, however, prove to be tedious and lengthy, and it would be more appropriate to make changes to the School Act that would provide for the rights of Franco-British Columbians in a manner that complies with the Constitution.

Such measures should place restrictions on the discretion of school boards, govern conditions for access to French-language classes and schools in accordance with 23, and place specific responsibilities on school boards relating to attendance areas, transportation and dormitory accommodation, and for the management of educational facilities. Otherwise, Franco-British Columbians would have to seek judicial enforcement of rights refused by the legislature, and would find themselves in the position of starting the process again each time a case arose. Damaging effects on the quality of education could result from such a multiplicity of cases, with potential appeals and contradictory decisions in the courts. Wisdom and legal certainty require that the legislature assume its responsibilities, if only minimally; it could set out the principle in the Act, and leave the details for applying the principle to be decided by regulation. Circular 146 would then become a provision with real legal effect. Any measures taken in British Columbia will have to take into consideration the provincial reality while at the same time not sacrificing the principle contained in section 23 of the Charter.



**XI. French-Language Education Rights  
in the Northwest Territories  
and Yukon**





French-speaking residents of both the Northwest Territories (N.W.T.) and the Yukon have very few rights to an education in their language. This situation results from the unique circumstances that affect this minority in the north, and from the nature of the population in the Canadian North in general. How can such a sparsely populated area be organized into a school system that will operate fairly while respecting both indigenous tradition and the Canadian Constitution? This job has recently been undertaken in the N.W.T.; the adoption of ordinance 9-84(2), which provides for equal status of French and English in the territories' institutions and greater latitude for the use of indigenous languages, has been a step forward. This progress now needs to be reflected in concrete changes in the field of education rights.

### Northwest Territories

#### 1. Fact situation

The French-speaking population of the N.W.T. accounts for 2.7% of the total population, which is similar to the situation in the western provinces. However, the French-speaking population of the schools hovers around 200 pupils - a very small number for such a vast expanse of territory. This situation may be explained by the fact that the law does not deal with French-language instruction. The Education Ordinance<sup>1</sup> contains a number of provisions relating to the language of instruction, but we were unable to find any guideline, policy or official statement dealing with the question. The CMEC report indicates that for the 1981-82 school year there were 150 French-speaking pupils out of a total of 12,500, and that seven of the 64 pupils enrolled in French immersion were French-speaking, immersion classes being the only instruction in French now provided by the territorial government in Yellowknife. This program is financed almost entirely by grants from the federal OLE program, including materials, books, documentation and part of the teacher's salary.<sup>2</sup>

The OLE profile contains a number of interesting annotations as to how the present situation could be improved. For instance, since the number of pupils in French immersion classes in Yellowknife is now restricted to 28, there may have been pupils refused admission for lack of available space; in any event, the demand does not originate with French-speaking parents. In addition, while some population centres in the N.W.T. are 10%,<sup>3</sup> 15%<sup>4</sup> or 30%<sup>5</sup> French-speaking, they do not offer French-language or even French immersion

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1. N.W.T. Ord. 1977, c. 2.

2. CMEC Report, 1983.

3. Frobisher Bay and Yellowknife.

4. Inuvik.

5. Nanisivits.

courses. The provisions of the Education Ordinance<sup>6</sup> are mostly used for indigenous languages.

Apart from the administrative powers that we shall describe in the next section, the Education Ordinance contains provisions delegating to the local authorities the responsibility for determining language of instruction, so that education may be adapted to the local culture. Sections 54 and 55<sup>7</sup> provide:

- 54(1) The local education authority or the divisional board of education, as the case may be, shall prescribe the language of instruction to be used for kindergarten in schools in the education district or education division, as the case may be, where a kindergarten program is offered, and for the first two years of the school program following kindergarten.
  - (2) Where a language other than English is prescribed as the language of instruction under subsection 1:
    - (a) English **shall** be taught as a second language, and
    - (b) instruction **shall** be provided in English for students whose first language is English.
  - (3) Where English is prescribed as the language of instruction under subsection (1) but is not the language of the majority of students, the first language of the majority of the students shall be taught as a second language.
- 
- 55(1) The executive member shall prescribe, after consultation with the local education authority or the divisional board of education, as the case may be, the language of instruction in schools in the education district or education division, as the case may be, for the years following completion of the first two years of the school program.
  - (2) Where the language prescribed under subsection (1) is a language other than the first language of a majority of students in a class, the local education authority or the divisional board, as the case may be, may arrange for the teaching of that first language.
  - (3) Students whose language of instruction is changed shall be assisted in making the transition to the second language.

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6. Supra, footnote 1.

7. As amended by ordinance 3-83(2).

56 (unchanged) The superintendent for a district may, with the approval of the local education authority, make such special arrangements for the teaching of languages as he considers appropriate.

We must therefore make a distinction between the first grades at the elementary level and the higher grades. In kindergarten, grades 1 and 2, the local education authority shall prescribe the language of education for a **school**: the entire school is covered by this decision. If the language prescribed is not the language of the majority of pupils in the school, their first language shall be taught as a second language; if the language prescribed is not English, English shall be taught as a second language and pupils whose first language is English **shall** be provided with instruction in English - this is an absolute right, and is not restricted by considerations of minimum numbers required. After grade 2, the minister shall prescribe the language of instruction for schools in the district, after consultation with the local education authority. If the language prescribed is not the first language of a majority of pupils in a **class** (that is, not in a grade, so that the section covers classes in which several grades are taught together, although in practice a class often contains a single grade), the local authority may arrange for the first language to be used. Subsection 55(2) is ambiguous: "may arrange for the teaching of the first language." This means, literally, that the first language may be taught, for example, in a language course. We would suggest that in this context the provision goes beyond this, and authorizes the local authority to arrange for the use of the first language for all subjects taught in the class, but in such a way and in such proportion as it considers appropriate, and in its discretion alone. On the other hand, this subsection guarantees no rights for children whose first language is English. The minister has the power to prescribe a language other than is prescribed by the local authority for the first two grades; thus we could imagine a scenario in which an indigenous language is prescribed for grades 1 and 2, in order to respect local culture, and the minister prescribes English for the higher grades. Subsection 55(3) imposes a duty on some unspecified authority to assist pupils to make the transition to the second language, if their language of instruction is changed.

In thus considering indigenous culture, the provisions of the ordinance may well be based on laudable intentions, and have beneficial effects; but in its consideration of the rights of French-language pupils, it will not meet the requirements of section 23 of the Charter. Viewed from the point of view of the rights of the official language minority, these provisions are in our opinion unconstitutional for a number of reasons:



- The Charter makes no distinction among grades, except for determining the pupil's eligibility; the right to receive instruction in French applies equally to all grades at the elementary and secondary levels. it would be unconstitutional, for example, to prescribe that French be used in grades 1 and 2 and English thereafter, and the N.W.T. legislation is inoperative to the extent that it would permit this to occur.
- The authorities have unfettered discretion in choosing the language of instruction. Such discretion is ultra vires and unconstitutional by virtue of the provisions of 23.
- The authorities have a duty to prescribe the language of instruction in a school; if English is the prescribed language it would be impossible to establish a French-language class in grades 1 and 2. Subsection 54(3) covers a situation in which the prescribed language is English but the first language of a majority of the pupils is another language. Does this mean a majority of pupils in a class or in a school? It would appear that 54 must be read so as to mean the entire school; thus there could be no French-language class in an English-language school, although such a possibility would be permissible under paragraph 23(3)(a) of the Charter. By prohibiting this situation, subsection 54(3) becomes inoperative.
- In addition, if we take a case that would be covered by subsection 54(3), where a majority of the pupils in a school is French-speaking, the only possibility under 54(3) would be to teach French as a second language. If English is prescribed for a school where the majority of pupils is French-speaking, it would violate subsection 23(2) of the Charter, so that subsection 54(3) would be inoperative on this point.
- Subsection 54(2) deals with a case in which a language other than English is prescribed; both common sense and subsection 23(3) of the Charter require that French be prescribed in a school where the majority of pupils is French-speaking, in order to avoid the situation we considered supra.
- Although section 55 of the ordinance is more moderate, it could be inoperative in certain situations involving French-speaking pupils. For one thing, the total discretion given to the minister with respect to the choice of language could not withstand challenge on the basis of the criteria set out in section 23 of the Charter.

- The local authority has complete discretion in choosing a language other than the language prescribed, if the language prescribed is not the language of a majority of pupils in a class. In the event that the language prescribed is English and a majority of the pupils in the class is French-speaking, the Constitution would require that French be used. The local authority should have no such absolute discretion, and instead there should be defined criteria for making the decision.
- The pupils' first language is not the criterion set out in the Charter. Parliament preferred to rely on their prior language of instruction, or one of the criteria relating to the parents.

Despite the fact that these provisions are flexible, or perhaps because they are, they cannot ensure that French-speaking residents of the N.W.T. will be able to exercise their constitutional rights. However, given the very low number of French-speaking pupils in the school system, can they in fact expect to be able to exercise these rights? Can it be argued that the low numbers of francophones is sufficient justification for this allocation of resources among anglophones, francophones and indigenous peoples?

The Charter provides these education rights only where numbers warrant. In some provinces, the required number is only one pupil, and the authorities take responsibility for gathering communities separated by distance into more homogeneous units. Can we say the same of the N.W.T.? The French-speaking population is concentrated in the capital, and those who live in isolated communities could benefit by provision of the necessary transportation and school residences, which are available to the native people because of the N.W.T.'s peculiar situation and the distances that must be travelled. It may therefore not be essential that the N.W.T. government adopt precise rules for implementing 23; francophones may request a French-language institution in Yellowknife and the opportunity for those who so desire who live outside the capital to enrol there, and may rely fully on section 23 for these rights. It would be appropriate, however, for the territorial council to include a statement of principle in the Education Ordinance recognizing the right of francophones to receive instruction in their language, and delegating power to the minister to implement this right when required under section 23, taking into consideration the problems peculiar to the N.W.T. Any measures taken that did not comply with this discretion could be invalidated by the courts as being contrary to the Charter and to the other principles of administrative law. In order for this service to be provided in a practical and rational way, it would be possible to provide procedures for establishing French-language classes at the elementary level in distant regions -

perhaps using recently developed technology as the tool for transmitting instruction - while at the high school level the government could provide a centralized school, transportation and residence accommodations for those who need it. The practical aspects of implementation should only become a consideration when the ability of French-speaking residents of the N.W.T. to exercise their constitutional education rights like other Canadians has been firmly established.

## 2. Administrative matters

The N.W.T. school system is largely controlled by local authorities, under the supervision of the minister; however, the 1983 amendments introduced the concept of school divisions, which may include one or more school districts.

The minister of education is ultimately responsible for the system; his duties include:

- 3(2) - establishing and dissolving education districts, education divisions and schools.
- 3(4) - the division of the N.W.T. into areas under superintendents;
  - approval of plans for new educational facilities;
  - special and experimental programs;
  - provision of libraries and resource facilities for schools not under the jurisdiction of education divisions;
  - educational television, if the minister believes that it is available and the students will benefit from it;
  - provision of related services (sports and recreation);
  - learning material;
  - recruitment and placement of teachers for districts with a community education committee;
  - employing advisers, as required;
  - operating residences and fees (may be delegated to a divisional board);
  - providing interpreters for meetings of community education committees.

The superintendent's powers include:

- 4(2) - supervision of the entire school system under his jurisdiction, including special programs;
- supervision of financial operations of community education committees;
- inspection of teachers and pupils;
- assignment of pupils to schools and transfers to institutions providing their grade level.

The ordinance sets up five management structures: community education committees, community education societies, community education councils, boards of education and divisional boards of education.<sup>8</sup> Members of these bodies are elected, and the various bodies have responsibility for different areas. They have jurisdiction over a school district, which takes in all the territory of any community where there is a school, and may be extended by the minister so that educational services may be provided to people residing outside those communities.<sup>9</sup>

The minister first designates community education committees;<sup>10</sup> the rules for the school districts are somewhat different.

These committees are made up of five elected members and a number of ex officio members, including the principal.<sup>11</sup> The committees discuss programs and make recommendations to the superintendent, and may suggest new programs. They are also to advise the superintendent on plans and sites for new schools, on residences and on the date of school opening, school closing and vacations.<sup>12</sup> The committees may also give advice on special programs and organize such programs (which may include aspects appropriate to local culture), provide for the management of school premises and give advice with respect to the personnel required to provide programs.<sup>13</sup> Fifty voters may ask the minister to change the committee to a society; the minister then has discretion as to whether to do so.<sup>14</sup> A society has somewhat more extensive duties:

- review reports on programs submitted by the principals in the district;
- prepare an annual budget for the district and supervise expenditures;
- advise the superintendent on plans and sites for new schools;
- provide for the management and maintenance of premises;
- hire the necessary personnel.

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8. S. 5(2).

9. S. 7.

10. S. 8(1).

11. Ss. 8(1) and 14(1).

12. S. 16.

13. S. 17.

14. S. 18.



The third level is the boards of education, both public and separate (since denominational rights are protected in the territories). The boards of education established in 1974<sup>15</sup> have been retained; 50 voters in a district which has a society may request a meeting at which a majority of the people present may approve a resolution changing the society to a board of education.<sup>16</sup> A board has seven elected or appointed members.<sup>17</sup>

A board of education has the right to levy property taxes,<sup>18</sup> has the power to borrow money<sup>19</sup> and is responsible for constructing and maintaining schools, hiring teachers and the usual duties of a body of this nature.<sup>20</sup>

Finally, an education division is established by regulation of the commissioner, on the advice of the minister and the request of the local education authority.<sup>21</sup> In this case, the minister becomes responsible for the buildings and land in the division.<sup>22</sup>

The divisional board created by the minister has seven elected members, in the case of a district,<sup>23</sup> or one member of the community education society in each district, if the division covers more than one district;<sup>24</sup> the minister may appoint additional members, in his discretion.<sup>25</sup> The funds in a division are provided by grants or contributions from the minister.<sup>26</sup> The divisional board is the general authority over educational affairs in the division. It exercises general supervision over the educational facilities and makes such by-laws with respect to program management as may be

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15. RO, 1974, c. S-3.

16. Ss. 24 and 26.

17. S. 23.

18. S. 39(1).

19. S. 55.

20. Ss. 37 and 38.

21. S. 53.1.

22. S. 53.1(5).

23. S. 53.3.

24. S. 53.4.

25. S. 53.5.

26. S. 53.7

necessary.<sup>27</sup> It may delegate powers to the superintendent<sup>28</sup> and review programs proposed by the superintendent.<sup>29</sup> It maintains lands and buildings and is responsible for constructing additional buildings where required, subject to the approval of the minister.<sup>30</sup> It provides library and audio-visual services and furnishes students with books and school supplies.<sup>31</sup> In addition, in consultation with the community education council concerned, the divisional board participates in the recruitment and selection of teachers.

By virtue of subsection 53.13(2), the divisional board is responsible for assigning students within the division; it shall consult with the community education council in the district where the child is resident, and may decide to assign the student to another education district within the division or to recommend to the minister that the student be assigned to another division. Such action may be taken in three situations: if a student has reached the highest level offered in his or her school, if the school does not offer a suitable program for the student, or if for any other reason the educational needs of the student would be better served at another school. The divisional board must first consult with the parents, and attempt to comply with their wishes, and must also consult with the community education council. This provision could be used by parents seeking to have their child educated in French, when there is no program at their child's school because there is not a sufficient number of children. Finally, 54.14(c) authorizes the divisional council to establish programs for students who, for any reason, are unable to take proper advantage of the regular school courses of study in the division. Section 74 could also be used in such a case; it permits a student in the N.W.T. to be sent outside the territories, at no cost to the family, to attend a special program. This right is available only at the discretion of the minister, and applies only where it is not practical or educationally effective to provide the program in a regular or special school within the territories, at the request of the parents, and on the advice of the superintendent. Taken together with section 23 of the Charter, this section would mean that, on the request of the parents, a student would have to be transferred to a French-language school in one of the western provinces. Of course, a student to whom this option were offered would suffer the disadvantages of being uprooted from his or her environment.

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27. Pars. 53.12(1) and (b).

28. Par. 53.12(e).

29. Par. 53.12(h).

30. Par. 53.12(1).

31. Pars. 53.12(m) and (n).

The work of the divisional boards is assisted by the community education councils, which have jurisdiction in each district within the division, and which must be consulted by the divisional board, as we have seen. The powers of the community education councils are similar to those of the community education committees that exist where there is no division or school board. Community education councils are made up of five to nine elected members and other appointed or ex officio members.<sup>32</sup> They assist the divisional boards in performing the board's duties.<sup>33</sup>

Overall, the various structures established by the government of the N.W.T. have jurisdiction over the daily operations and management of the schools. There is centralized control of the system, but the local bodies provide flexible implementation of the provisions we have examined, and adapt them to the local cultural situation, which must by law be taken into account in planning programs and activities.<sup>34</sup>

### Conclusion

The provisions of the Education Ordinance demonstrate the N.W.T. government's overriding concern about the indigenous peoples, who are together the largest minority in the territories. The ordinance does not, however, fully meet the constitutional requirements for French-language instruction. French-speaking residents of the territories could perhaps prove that the number of children of parents who qualify under 23 would be adequate to justify a French-language school in the capital, and the other provisions of the ordinance could be used to have French-speaking pupils transported to such a school. As well, modern communications methods could be put to use to provide French-language services. Although the effects of 23 in the N.W.T. will be different from the situation elsewhere in the country, French-speaking people there also have constitutional rights which must be respected.

### **The situation in the Yukon**

French-language education rights in the Yukon are the same as those in the Northwest Territories: French-speaking residents of the province may exercise these rights if they want their children to attend French immersion at the elementary level. On the basis of the last census, the CMEC report indicates that there are 45 French-speaking pupils in the Yukon, out of a total school population of over 5,000 pupils. The Act and regulations are silent on the question of French-language instruction; there is an immersion class

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32. S. 53.18.

33. Ss. 53.24 and 54.25.

34. Ss. 57, 63(2), 64(2) and 67.



in two schools in the territory, accounting for some 100 pupils in 1982 in kindergarten and grades 1 and 2, including about 10 French-speaking pupils. A French-language program was established in Whitehorse in September 1984, to cover grades 1 to 6. Sixty pupils were expected, and 31 actually enrolled. The program is financed 100% by the federal government. The program will be extended next year to grades 7 to 9 and kindergarten, which will cover all 60 pupils originally planned for.

This program is based on guideline 7230, of October 12, 1984. The deputy minister established that the Yukon would provide separate instruction in French where numbers warranted, for pupils entitled to French-language instruction under 23 who wished to be educated in French. The guideline uses the expression "separate French-language instruction," which does not necessarily mean schools. The most controversial aspect of the guideline, however, is the definition of the pupils to be served and the interpretation adopted by the minister. The target pupil population is described in the guideline:

- children whose mother tongue is French;
- who want, or whose parents or guardians want them, to receive instruction in French;
- children whose parents are not French-speaking according to section 23 are not eligible.

The Charter does not deal with the language of the children, or the need for a request in determining numbers or in obtaining the right. It could be argued that these are reasonable limits. The first and third criteria are contradictory, in that they adopt different techniques for identifying potential pupils: the program will be reserved for French-speaking children, but parents who do not qualify under 23 will be excluded. Restrictions on potential users are, in our opinion, a valid measure under the Charter, but there would have to be a uniform criterion based on the categories defined in section 23.

Admission to the program is also limited to two situations:

- for residents of the region (which is not defined), only kindergarten and grade 1 are available;
- for people outside the region, there is no restriction.

A resident child 10 years old in grade 5 would not have access to the program, while an identical child from outside the region would benefit from it. In a letter to the parents' committee, the minister explained this restriction on the basis of a desire to prevent constant movement of pupils from the English-language system to the French-language system or vice versa, while also stating that he was prepared to study any individual request on its merits.<sup>35</sup>

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35. Letter from the minister, January 17, 1985. Personal documentation.



Any such restriction on access to French-language schools violates section 23, since the Charter guarantees unconditional access for all children whose parents qualify, to all grades at both elementary and secondary level. If there are to be limitations imposed in order to prevent frequent transfers of pupils from one system to another (which seems to us to be an unlikely scenario), they must be formulated differently.

On the strict level of language of instruction, section 115 of the School Ordinance,<sup>36</sup> which seems to us to be constitutionally acceptable, provides:

All schools shall be taught in English, but the superintendent may permit any class or course to be taught in another language in any school.

This section is not compatible with section 23 of the Charter, since:

- it makes instruction in English mandatory, while 23 provides that French has equal status with English in respect of instruction in the Yukon;
- the superintendent has total and unfettered discretion in respect of French-language instruction;
- this discretion may be applied to any class or any grade;
- if section 115 is removed, there is no provision in Yukon law to protect French-speaking residents.

A claim may be made by francophones in the Yukon to French-language institutions, pursuant to section 23 of the Charter; in doing so they could base their claim on a number of sections in the Yukon School Ordinance, which we shall now consider.

The Yukon school system is even more centralized than the system in the N.W.T. Power is conferred by the government on the Yukon commissioner, but in practice is exercised by the minister.<sup>37</sup> We shall use the expressions used in the Act in this study.

The commissioner therefore has virtually total power over the schools, including the following:

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36. ROY, 1978, c. S-3.

37. The title "Minister" is conferred on members of the Executive Council of the Territory by Order-in-Council 1982/184, s. 3.

- to establish schools, including denominational schools, and to close, operate and manage schools;<sup>38</sup>
- to prescribe courses of study;<sup>39</sup>
- to employ teachers, on the recommendation of the superintendent;<sup>40</sup>
- to provide correspondence courses.<sup>41</sup>

The superintendent is responsible for the general organization and operation of the schools.<sup>42</sup> He is assisted in these functions by regional superintendents, whose powers are more specific and cover the good functioning and inspection of schools.<sup>43</sup>

When a pupil resides more than two miles from the school, the commissioner shall provide transportation or accommodation or an allowance in lieu.<sup>44</sup> Regulation 1974/214,<sup>45</sup> section 27, fixes the amount of this allowance. If the pupil's home is less than two miles from the school, the pupil shall pay a fee for transportation.<sup>46</sup>

The school committees are composed of elected members<sup>47</sup> who assist the regional superintendent in performing his functions. Section 72 states, inter alia:

- (j) request the superintendent to authorize a course of study or modification of a course of study;
- (l) discuss alteration to facilities;
- (m) discuss how funds may be spent;
- (n) discuss the application of local educational policies.

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38. Ss. 4 and 7.

39. S. 14.

40. S. 11.

41. S. 32.

42. S. 16.

43. S. 20.

44. S. 37(2).

45. Amended by OIC 1983/199.

46. S. 37(3) and regulation, s. 27(3).

47. Amended by OIC 1983/199.

Section 116 authorizes the commissioner to enter into agreements for the education of children in the territory, without further detail.

With respect to denominational schools, section 227 sets out the numbers, which provide us with an indication of the government's thoughts: 15 pupils and four resident families may be sufficient to justify establishing a school. Along the same lines, the regulations indicate that the commissioner may ask the superintendent to close any school with an attendance below 12 pupils. Thus in the Yukon, a poor territory with a widely scattered population, 15 pupils are enough for a school to be opened, and fewer than 12 may result in closing. By analogy, this number could be applied to French-speaking pupils and families, who may request a school with 45 pupils.

### Conclusion

The St. Jean case dealt with the legal status of the Yukon, and the applicability of the federal Official Languages Act and of sections 16 to 22 of the Charter. The next step will be for French-speaking residents of the territory to ensure that section 115 of the School Ordinance is adapted to the constitutional obligations imposed on the territory, and claim their right to a French-language school, since they can demonstrate the minimum numbers required by the Yukon government to establish a school in other circumstances. The Yukon approach to the problem may resemble that of the N.W.T. The success of the current program will be crucial, and all efforts should now be devoted to ensuring that it gets off on the right foot.

**PART II**  
**SYNTHESIS**





## Introduction

The task of gathering all the parts of this study into a coherent synthesis is not an easy one. Each provincial system has its own characteristics, and each province is adamant that its own situation is unique, and that a unique solution must be found for its problems. However, we believe that we can take from the study of each province a number of characteristics that may be used as the basis for reform. While we may want and even need flexibility, and while the provinces may have exclusive jurisdiction over education, section 23 nonetheless imposes a constitutional standard on each provincial legislature, and each legislature must devise an education system that will comply with this standard. It has been clear that the existing legislation often fails to meet this standard. Certainly there have been efforts made since 1980, but the addition of section 23 to the Constitution has resulted in some changes to the legal situation. No longer is it adequate to permit instruction to be offered in the minority language: instruction in the minority language must be offered. Given this requirement, we have analyzed the details of the provincial legislation as it relates to the fact situation, and we have concluded that by and large such legislation is invalid. In this synthesis, we shall attempt to reach a clearer understanding of the requirements of section 23, to indicate the major failings of the provincial statutes, and to propose what appear to us to be appropriate methods of complying with section 23 of the Charter. These proposals should be seen for what they are: efforts at systematic rationalization of a very complex totality, based on a few broad principles, and open to varying forms of implementation. They cannot replace serious effort on the part of the authorities, directed toward implementing section 23 in such a way that the system will be efficient but will also provide effectively for the protection guaranteed by the Charter.



**I. Interpretation  
of Section 23**





In the cases to date, the courts have taken four differing approaches to interpreting section 23 of the Charter. The first and most obvious approach is to interpret section 23 in a broad and liberal manner, so as to accomplish the goal for which it was included in the Constitution. The second approach is to see section 23 as a remedy for historic evils suffered by minority-language groups. The third approach is to see section 23 as correcting existing education systems, by adding rights to the provisions now in effect. Finally, section 23 may be seen as establishing equality of rights and services between the majority and the minority within a single province, and among the minority-language groups in the country, especially between English-speaking Quebecers and francophones outside Quebec. We intend to consider each of these approaches and the consequences that would result from each.

1. The liberal interpretation

Each of the authors and judges who have dealt with the question of what approach to take in interpreting the Charter has emphasized that it must be interpreted liberally and generously. With section 23 of the Charter in particular, the first impressions left by the cases indicate that section 1 of the Charter will not have the same effect that it may have in other situations.

In 1982, Deschênes, J. wrote:

Toute l'économie du droit constitutionnel vise à en assurer l'interprétation libérale et l'application généreuse et uniforme à travers le pays...il ne faut donc pas hésiter à donner à la charte l'interprétation large et libérale qu'elle réclame au titre d'un chapitre important de la Constitution du Canada.<sup>1\*</sup>

The Court of Appeal of Ontario in turn stated:

This court has recognized that the Charter must be given a broad and liberal interpretation. It has stated that the Charter must not be stultified by "narrow technical interpretations without regard to its background and purpose." Section 23 of the Charter particularly must be given such a liberal interpretation

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1. Quebec Association of Protestant School Boards v. Procureur Général du Québec, [1982] CS, p. 673, at 686 and 687.

\* Translation:

The entire approach of constitutional law is intended to ensure a liberal interpretation and generous and uniform application of the law throughout the country...we must therefore not hesitate to interpret the Charter in the broad and liberal manner that it calls for, as a significant part of the Canadian Constitution.

for it enacts new rights and in effect creates a code which establishes minority-language education rights for the nation.<sup>2</sup>

In another case, the Supreme Court of Canada gave the first indications of the liberal approach it was to take:

The Charter comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law. Indeed, it "is the supreme law of Canada": s. 52, Constitution Act, 1982. It cannot be readily amended. The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch. Flexibility must be balanced with certainty. The future must, to the extent foreseeably possible, be accommodated in the present. The Charter is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknown of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the BNA Act, 1867 (now the Constitution Act). With the Constitution Act, 1982 comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the court.<sup>3</sup>

Thus in interpreting the Charter we must give consideration to the future, the development of the law and of society, the new balance to be struck between the state and the individual and between flexibility and certainty. If we apply this approach to section 23, we must take into account the development of minority-language groups through their schools and find a balance between the flexibility that is needed in order to adapt the school system to future realities and provisions for the members of the minority to exercise their rights effectively.

Legal authors have also proposed a liberal approach to the Charter, and they have particularly agreed that section 23 must be generously interpreted. Thus Professor Magnet stated:

The historical background suggests that section 23 must receive a large, liberal and robust interpretation...in a spirit that

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2. Re Minority-language education rights (1984), 10 DLR (4th), p. 491 at 518.

3. Skapinker v. LSUC (1984), 53 NR, p. 169 at 180.

foresees widespread mobility for francophone minorities without fear that the education system will attack the children.<sup>4</sup>

In interpreting section 23, we must first look for the meaning most likely to ensure that the goals it embodies are reached. We shall identify these goals here. A large and liberal interpretation should not result in equal, unlimited and unrestricted access for all children to French-language education; to argue that section 23 enshrines absolute freedom of choice in language of instruction amounts to negating the ultimate goal of the guarantee, which is to ensure that minorities are protected by strengthening their educational institutions.<sup>5</sup> On the contrary, such protection requires special measures that are adapted to the constraints imposed by the fact of being in a minority. The goal of section 23 of the Charter is closely related to the need for French- and English-speaking Canadians to be able to move about the country, as Prime Minister Trudeau stated when he unveiled his plan for patriation.<sup>6</sup> Canadian citizens must be able to move freely throughout their national territory, and take up residence and earn their living where they choose, without fear of having to send their children to schools belonging to the majority, if they do not wish to do so. A large and liberal interpretation will lead us to find rights in section 23 that are not explicitly set out there. We must show generosity toward the minority; the criteria that will be developed for implementing section 23 coherently must take this requirement into account.

It is appropriate here to note that international agreements in this field require that Canada and the provinces fulfil certain obligations relating to education.<sup>7</sup> The UNESCO convention against discrimination in education imposes firm obligations on the signatory countries, and provides for the others a standard for fair and just legislation respecting education. Specifically, the convention provides that the establishment of a separate school system for the

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4. J. Magnet Minority-language education rights (1982), 4 Supreme Court Law Review, p. 195 at 213.

5. Testimony of the minister of justice, the Honorable Jean Chrétien, before the special joint committee of the Senate and House of Commons on the Constitution. Transcript of proceedings, First Session, 32nd Parliament, 1980-1981, 4:21.

6. Cf., quotation in P. Foucher Les droits scolaires des Acadiens et la Charte (1984), 33 UNB Law Journal, p. 97 at 99.

7. Reference to international sources in interpreting the Charter was approved and used by J. Deschênes supra, note 1, and in R v. Kochechny (1983), 33 CCC (3d), p. 233, 6 DLR (4th), p. 350 (BCCA), Re Mitchell (1981), 6 CCC, (3d), p. 193 (Ont. HCJ); R v. Cameron, 1982, 6 WWR, p. 270.



minority-language group is not prohibited discrimination; it imposes an obligation on the states parties to ensure that there is equal treatment in education and that the quality of instruction is equivalent to that in the public schools; and finally, it requires that they give their minorities the right to manage and control the separate educational facilities, provided that these systems do not prevent members of the minority from understanding the culture of the majority, do not compromise the sovereignty of the state, do not abolish the minority's freedom of choice, and do not provide inferior education.<sup>8</sup> Article 27 of the International Covenant on Civil and Political Rights prohibits states from taking any measure that would deny the right of linguistic minorities, together with other members of their group, to enjoy their own culture, to profess and practise their religion, or to use their own language.<sup>9</sup> A report by the Sub-commission on Prevention of Discrimination and Protection of Minorities viewed this article as imposing a legislative obligation on the states to ensure that the education rights of linguistic minorities are respected.<sup>10</sup>

A large and liberal interpretation of section 23 of the Charter will contrast with the manner in which the judicial committee of the Privy Council interpreted section 93 of the Constitution Act, 1867. It will be recalled that beginning in 1874 the judicial committee restricted the scope of the constitutional protection to those schools that were denominational by virtue of a statute at the time of Union, and only to the extent that such statute applied.<sup>11</sup> It was undoubtedly this factor that motivated Riel and the Franco-Manitobans to include a provision in section 22 of the Manitoba Act, 1870, that rights and privileges enjoyed by religious groups **by law or practice** would be protected. However, in 1892, the judicial committee decided not to invalidate the new school

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8. See Articles 2(b), 4(b) and 5(c) of the convention, cited in Human Rights: a compilation of international instruments, United Nations, 1983, New York, ST/HR/1/Rev.2.

9. Article 27, supra, reads:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to profess and practise their own religion, or to use their own language.

10. Francesco, Capotorti Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, United Nations, New York, 1979, E/CN.4/Sub.2/384/Rev.1.

11. Ex. p. Renaud (1873) 14 NBR, p. 73; Conf. Maher v. Town of Portland, 1896, Wheeler, Confederation Law of Canada, p. 338.

legislation, because it did not prejudicially affect the rights of Catholics and Protestants: it permitted them to maintain their own schools at their own expense, while still having to pay taxes for the public schools.<sup>12</sup> Two years later, the judicial committee recognized that this approach was restrictive, but was adamant that it did not intend to rewrite the Constitution, and that as far as possible it would preserve the sovereign legislative jurisdiction of the provinces over education.<sup>13</sup> In 1917, the judicial committee decided that minority language rights were not protected by 93.<sup>14</sup> In 1928, the judicial committee refused to recognize that Ontario had a constitutional obligation to fund Catholic secondary schools<sup>15</sup> or the Jews in Quebec had a constitutional right to sit on the Catholic or Protestant school boards.<sup>16</sup> While the case law under section 93 may assist us in understanding the scope of denominational rights<sup>17</sup> and the powers inherent in such rights,<sup>18</sup> it does not provide us with the higher inspiration needed in interpreting section 23. Section 93 entrenched a compromise,<sup>19</sup> putting the accent on religion and maintaining the status quo. Section 23 of the Charter is also a compromise, but of another sort. We shall consider this question in greater depth in the next section, but we can say briefly that this sort of legislative provision is new in Canadian law and will require a new approach.

## 2. Section 23 remedies the errors of the past

This aspect of section 23 was emphasized by the Court of Appeal of Ontario, which found it appropriate to consult history:

12. City of Winnipeg v. Barrett, 1982, AC, p. 445.

13. Brophy v. Attorney-General Manitoba, [1984] AC, p. 202.

14. RC Sep. ST for Ottawa v. Mackell, [1917] AC, p. 62.

15. RC Sep. ST for Tiny v. The King, [1928] AC, p. 363.

16. Hirsch v. Protestant School Board for Greater Montreal [1928] AC, p. 200.

17. Clément-Séguin v. Procureur Général du Québec, [1980] CS, p. 443.

18. Greater Hull School Board et al. v. Attorney General of Quebec (1985), 56 NR, p. 99.

19. Tiny, supra, footnote 15, p. 368.

We believe that the court's concern for these rights requires a move away from narrow and strict constructionalism toward a broader approach, which would include a consideration of the historical developments, particularly in the field of education... . Such considerations may serve to broaden our approach to the issue at hand, and to avoid resort to strict legal principles of interpretation.<sup>20</sup>

The court studied developments in the legislation and in historical circumstances relating to minority language education, and then stated:

What that history reveals, as outlined in the introduction to this opinion, is that rights or privileges to determine language use in educational facilities, which the French-speaking minority had at the time of entering into the federation, were later denied.<sup>21</sup>

The conclusion that the court reached was to determine the decision it reached: "The historical background set out earlier makes it apparent that the lack of effective control of French language education and facilities has led to the rapid assimilation of francophones in Ontario."<sup>22</sup> Thus section 23 of the Charter is intended to counteract the pressures in the environment to assimilate. It must be interpreted in a specific provincial context by studying the existing school legislation as it relates to this question over the course of the history of the province, as well as the situation of the minority. Demographic and historical evidence will be necessary. It is not only the history and genesis of section 23 itself that is relevant, but also the history and genesis of education rights in the province, and their effect on the development of the minority. These factors will have considerable weight in determining the substance and extent of the rights contained in section 23.

### 3. Section 23 adds rights to existing education systems

The Court of Appeal of Ontario based its decision on extrinsic evidence submitted by ACFO, finding that the Education Act did not meet the needs of the minority because, inter alia, it allowed the majority to determine what the rights of the majority would be. The evidence included recitals of refusals, battles and pressures exerted to obtain homogeneous schools. The court concluded:

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20. Supra, footnote 2, p. 507.

21. Id., p. 530.

22. Id., p. 531.



It is quite clear that events such as those described above were the "mischiefs" within the contemplation of those who drafted, revised and adopted section 23 to remedy them. Lack of meaningful participation in management and control of local school boards by the francophone community made these events possible...<sup>23</sup>

The Supreme Court of Canada adopted a similar approach in considering section 23:

This set of constitutional provisions was not enacted by the framers in a vacuum. When it was adopted, the framers knew, and clearly had in mind, the regimes governing the anglophone and francophone linguistic minorities in various provinces in Canada so far as the language of instruction was concerned. They also had in mind the history of these regimes, both earlier ones... as well as more recent ones... Rightly or wrongly - and it is not for the courts to decide - the framers of the Constitution manifestly regarded as inadequate some - and perhaps all - of the regimes in force at the time the Charter was enacted, and their intention was to remedy the perceived defects of these regimes by uniform corrective measures, namely, those contained in section 23 of the Charter, which were at the same time given the status of a constitutional guarantee.<sup>24</sup>

With respect to the "numbers warrant" test, Professor Magnet also postulated the remedial approach (and was the first to do so):

If the numbers test in section 23 were only to entrench the status quo, a request by 15 to 25 qualified parents should trigger the right to French instruction. However, viewed as a remedial provision, section 23 must be deemed to change something. This suggests that the right to minority-language instruction arises with lesser numbers.<sup>25</sup>

This reasoning may be applied to all aspects covered by section 23, not only numbers. It has, in fact, been applied in Quebec in dealing with access to English-language schools, and in Ontario in dealing with the school system as a whole. In each of these provinces, we have to examine the school system in light of this principle, and consider, a priori and subject to any evidence to the contrary by the school authorities under section 1, that any measure that is likely not to permit the linguistic minority to exercise the rights conferred by the Constitution is suspect. Provincial educational systems are to be remedied by section 23 of the Charter;

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23. Ibid.

24. Attorney-General of Quebec v. Quebec Association of Protestant School Boards et al. (1984), 10 DLR (4th), p. 321 at 331-332.

25. Supra, footnote 4, p. 206



therefore it seems to us to be unreasonable to argue that they already confer more rights than are contained in section 23. These school systems for the most part pre-date section 23, but even if they post-date it, the rule that the Constitution will prevail, explicitly affirmed in section 52 of the Constitution Act, 1982, will put these systems in the same situation. The history of section 23 itself confirms the appropriateness of the remedial approach. While the first ministers of the 10 provinces were unable to reach a definitive agreement on how to entrench the St. Andrews accord in the Constitution, the fact that section 23 was included is an indication of the fact that the framers of the Constitution found the existing systems to be ineffective and wished to strengthen the points where they were weak. Section 23 covers a specific category of persons, and provides a remedy for a specific social problem. These persons are members of linguistic minorities; the problem is that of assimilation. Section 23 is intended to protect children whose parents' mother tongue is the minority language from assimilation, and to permit this minority group to win back the children of those who received their primary education in the minority language. Its goal is therefore not to create complete freedom of choice. The remedial approach allows us to breathe into section 23 an energy and breadth that the words used would not necessarily reveal alone. As well, if it had been felt that the minimum standard of rights to be protected provided by section 23 was below the standard of rights that were already available, there would have been little reason for entrenching such a provision: minorities would have the benefit of the existing systems and would have no need of special protection. It is precisely because of their minority status that francophones outside Quebec and English Quebecers need special provisions that grant them recognition and protection.

#### 4. Section 23 is a standard for equality

Since section 15 of the Charter came into effect, the concept of legal equality between minority and majority has been given a scope that was hitherto unsuspected. Section 15 may have a major impact on how section 23 is to be interpreted. We might consider that the concept of "equal protection and equal benefit of the law" may extend to the treatment of any official language minority group in equivalent circumstances. It may affect our assessment of the quality of services provided and of material made available to minorities. The courts may believe they are justified in raising the qualitative standard of educational services provided to the minority to a level comparable to those offered to the majority.

This spirit of intraprovincial equality between minority and majority, and of interprovincial equality among minorities, may already be inferred from the spirit of sections 16 to 23 of the Charter and the two leading cases on the point. The first part of

subsection 16 (1) proclaims that the official languages of Canada have equal status and rights. Sections 16 to 20 as a whole, which apply only to federal and New Brunswick institutions, reflect this duality. Section 23 itself is designed to promote balance and equality. The Supreme Court of Canada stated clearly:

The framers' objective appears simple, and may readily be inferred from the concrete method used by them: to adopt a general rule guaranteeing the francophone and anglophone minorities in Canada an important part of the rights which the anglophone minority in Quebec had enjoyed with respect to the language of instruction before Bill 101 was adopted.<sup>26</sup>

In the opinion of the Supreme Court, the framers of the Constitution demonstrated a desire to bring a measure of balance to the school systems across the country, based on the situation of English Quebecers before 1977. If anglophones had a legal right to instruction in English<sup>27</sup> in homogeneous schools, which they managed through the Protestant system, financed largely out of public funds, should other official language minorities not have the benefit of an equivalent system, with the adaptations that might be needed in order to comply with the numbers test in the Charter?

The Court of Appeal of Ontario, on the other hand, emphasized the need for equality between the majority and minority systems:

The legislature has exclusive power to make laws in relation to education and to establish a system for the management thereof that it deems suitable to conditions in the province. Section 23 limits this power in respect to minority-language education. The rights conferred by this section with respect to minority-language facilities impose a duty on the legislature to provide educational facilities which, viewed objectively, can be said to be of or appertain to the linguistic minority in that they can be regarded as part and parcel of the minority's social and cultural fabric. The quality of education to be provided to the minority is to be on a basis of equality with the majority.<sup>28</sup>

A little earlier, the same court had stated: "Although s. 15 was not referred to in argument on this point and is not yet in force, a perusal of it tends to support our conclusion."<sup>29</sup>

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26. Supra, footnote 24, p. 335.

27. Bill 22, SQ, 1974, c. 6.

28. Supra, footnote 2, p. 533

29. Id., p. 529.

Professor Ann McLellan of the University of Alberta<sup>30</sup> and Professor Nicole Duplé of Laval University<sup>31</sup> have both publicly stated that if we apply section 15 to section 23, we would be able to interpret section 23 as requiring equality of content, teaching, facilities and treatment. The courts will soon have to consider this question: the Marchand<sup>32</sup> and Bugnet<sup>33</sup> cases rely on section 15 together with section 23; the first case relates to school facilities, and the second to the right to manage.

Anyone seeking to interpret the provisions of section 23 may refer to both the legislation and the concrete circumstances of the majority, as well as to the manner in which the official language minority group is treated in another province. If the province involved in the case claims that the circumstances of its own minority do not support such a comparison, there will have to be evidence given in accordance with the requirements of section 1 of the Charter.

### Conclusion

We have considered four tendencies in the interpretation of section 23 of the Charter, which must be taken into account in any serious, objective legal study of section 23 and its impact on the various provincial statutes. First, section 23 is to be given a large and liberal interpretation, which would be generous to the minority, would allow for growth and change, and would respect the goals and objectives of the framers of the Constitution. These goals and objectives must be determined on the basis of section 23 itself, the other interrelated sections, the context in which section 23 was

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30. Conference on Minority-language education rights and the Charter, Château Lacombe, Edmonton, April 22, 1985.

31. International Conference on Minority Rights, Chateau Frontenac, Quebec City, March 5-8, 1985, on March 7.

32. Jacques Marchand et al. v. Simcoe County Board of Education, Supreme Court of Ontario. Plaintiffs are seeking the addition of a gymnasium to the French-language school. Trial to be in the fall of 1985.

33. Association Georges et Julia Bugnet et al. v. Attorney-General for Alberta, Alberta Court of Queen's Bench. Trial to be in April 1985.



enacted and available extrinsic evidence.<sup>34</sup> These sources tend to indicate that the very essence of section 23 lies in the concept of Canadian duality developed during the 1960s, which led to official bilingualism and the strengthening of official minority-language structures.

Secondly, history has an important role to play in the interpretation of section 23 - both the history of section 23 itself and the history of the educational situation in the various provinces will be useful in understanding the meaning and content of section 23.

Thirdly, the remedial approach invites us to see section 23 as a corrective device: it must be understood as an instrument for altering the existing school systems. Section 23 did not entrench the status quo; it added more rights, and raised the minimum standard for access to these rights.

Finally, section 23 demonstrates a will to create equality of rights and status between the minority and the majority within a province, on the one hand, and among the various official language minority groups in Canada, on the other hand - and especially between English Quebecers and francophones outside Quebec. Section 15 of the Charter provides legal support for this proposition.

We shall keep these principles in mind in the next part, which deals with identifying the main failings found in most provincial education legislation, and the effect of section 23 of the Charter.

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34. Such evidence was admitted in the Ontario reference, and in other constitutional cases. Cf., Re Anti-Inflation Act, [1976] 2 SCR, p. 373; Reference re Senate Reform, [1980] 1 SCR, p. 54; Reference re Ontario Residential Tenancies Act, [1981] 1 SCR, p. 714; Reference re Upper Churchill Water Rights Reversion Act (1984), 53 NR, p. 268. It may include the transcripts of proceedings of the Joint Senate and House of Commons Committee on the Constitution of 1982, and briefs filed with the committee; various reports: Laurendeau-Dunton, Books 1 (1968) and 2 (1969); Pépin-Robarts (1979); Gendron (Quebec, 1972); McGuigan - Joint Committee on the Constitution (1972); reform proposals: Victoria Charter, 1971; Proposals of the Canadian Bar Association: "Towards a New Canada." 1979; "A Time for Action" and Bill C-60, 1978; the beige paper of the Liberal Party of Quebec, 1979; the reports of the proceedings of the House of Commons from 1980 to 1982; reports relating to education, including Symmons (1974, Ontario), Finn-Elliott (1979, N.B.), Graham (1974, N.S.); reports of the Commissioner of Official Languages, 1978-1984; data from the 10-year Statistics Canada census; relevant international sources.





## **II. Analysis of Education Legislation**



In our opinion, in light of the preceding discussion, provincial education legislation and practices are marked by major defects in their provisions for discretionary powers, the calculation of numbers, freedom of choice in language of instruction, confusion of programs and pupil populations, immersion and bilingual instruction; these factors are closely connected to the preceding problem, the absence of guarantees of schools and of the right to manage the schools.

We propose here to analyze the defects we have found in most education legislation in relation to the distinction that we believe has been established between limiting a right and denying a right. We shall first identify the problems in the existing legislation.

1. Discretionary powers

The question of the validity of the delegation of discretionary powers by provincial education legislation to the minister of education or to the school boards is one of the most difficult issues we face, legally speaking. Such delegation generally relates to decisions of an administrative nature, such as school site selection, attendance areas, inter-district agreements and drawing the school map; and of a pedagogical nature, such as textbook selection, program development and hiring and assigning teachers. These various matters are allocated throughout the levels of the school system, depending on the province. They all have a direct effect on the provision of educational services in the language of the minority. If we look at the question of when to open a class or school, we find enormous variety. In some cases, neither the Act nor the Regulations refer to the right of minorities to instruction in their language<sup>35</sup>; in that case, we have to refer to the provisions we cited supra which are of general application to any existing administrative guidelines,<sup>36</sup> and to the requirements of section 23 of the Charter.

In other cases, the Act imposes a duty on the minister of education or the school board to provide classes if a minimum number of pupils, whose parents so request, can be brought together within

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35. The legislation in question is found in Newfoundland (RSN, 1970 c. 346); British Columbia; the Yukon (School Ordinance, ROY, c. S-3); the Northwest Territories (Education Ordinance, 1977, c. 2).

36. Guideline 146 in British Columbia; guideline 7230-84, issue 2, in the Yukon.



the school division.<sup>37</sup> The authorities may use discretion in determining whether the required number may be found. If it cannot be found, the minister or the school board will have discretion as to whether it will comply with the request or offer alternative options. The third possibility is that the legislation may delegate to the minister or the school board the discretionary power to designate schools or classes where instruction will be provided in the minority language.<sup>38</sup> Finally, two statutes provide for a dual school map, one for the official-language majority in the province, and the other for the province's official language minority.<sup>39</sup> Within this framework, the authorities are free to organize instruction in their language. The school map is determined by the minister, after consultation with the parties involved.

Professor Proulx believes that if the minister of education is to be given discretion, there must be a limit placed on the rule of Crown immunity to injunction. In his opinion, such immunity cannot protect a government which has made an unconstitutional decision,<sup>40</sup> and is today based on legislation rather than on royal prerogative, the legislation in question being subject to the Charter;<sup>41</sup> while it may be a prerogative power, the exercise of the power is governed by section 32 of the Charter, which provides that the Charter applies

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37. This was the situation in Ontario before the reference to the Court of Appeal (RSO, 1980, c. 129, ss. 258-278) - the minimum number was 25 for elementary grades and 23 for secondary. It is still the situation in Manitoba, where the number required is 23 (Public Schools Act, SM, 1980, c. 33, s. 79); in Prince Edward Island, where the number required at the elementary level is 25 over three grades (School Act, RSPEI, 1974, c. S-2; Reg. 15-81, s. 5.31); in Saskatchewan, where the number required is 15 over three consecutive grades (Education Act, SS, c. E-0.1, s. 180; Reg. 116/81, s. 32.1); and in British Columbia, where the number required is 10 (Circular 146).

38. This is the situation in Alberta (School Act, SA, 1980, c. S-3, ss. 27, 158, 159) and in Nova Scotia (Education Act, SNS, c. E-2, ss. 3aa, 5aa).

39. This is the situation in New Brunswick (Schools Act, RSNB, 1973, c. S-5, ss. 3.1, 3.3, 18.1) and in Quebec (Education Act, RSQ, 1977, c. I'14; Bill, 1985).

40. See Amax Potash v. Government of Saskatchewan, 1977, 2 SCR, p. 576.

41. Daniel Proulx, La précarité des droits linguistiques scolaires (1983), 14 RGD, p. 335 at 357-358.

to the government.<sup>42</sup> As a result, a court would be justified in ordering the minister to make a specific decision. If the discretion is delegated to the school board, the court can intervene more directly to review a decision: school boards do not have Crown immunity because they are independent; they are distinct entities from the government.<sup>43</sup> However, legal authors consider them to be subject to the Charter, since section 23 relates to them by necessary implication, and since they are "within the authority of the legislature" as provided in paragraph 32(1)(b).<sup>44</sup> The courts face another problem here: the deference they have always shown to the exercise of discretionary powers by elected bodies acting in good faith.<sup>45</sup> Judicial control has always been limited to reviewing legality, and not appropriateness. If a court were to be asked to make an order against a school board, it had to be demonstrated that the Act imposed duties on the board.<sup>46</sup> Such duties now flow from the Charter; the courts may intervene legally. As well, sections 1 and 23(3) of the Charter will require our judges to determine the reasonableness of legislation, regulations and decisions. If an Act is silent, or requires numbers that are considered to be arbitrary, it is the opinion of Professor Proulx that a court would have to make an order to fill the vacuum.<sup>47</sup>

42. Pierre Foucher, supra, footnote 6, pp 121-122. Operation Dismantle v. Attorney General of Canada, SCC, judgment May 9, 1985.
43. P. Garant, Droit Administratif, pp. 77-85.
44. Pierre Foucher, and Gérard Snow, Les droits linguistiques dans l'administration publique au Nouveau-Brunswick (1983), 24 Cahiers de droit, p. 81 at 90.
45. Re Thompson and Lambton County Board of Education (1972), 3 OR, p. 888; MacDonald et al. v. Lambton County Board of Education (1982), 37 OR (2d) p. 221; D et al. v. Board of Education for the City of North York (1981), 13 MPLR, p. 1.
46. Henckel v. Board of Medicine Hat SD, No. 4 (1950), 2WWR, p. 369; Perreault v. Board of Kinistino School (1957), 21 WWR, p. 17.
47. Supra, note 41, pp. 363-365.

The preceding discussion presumed that the legislative mechanisms for delegating power in relation to education are valid. Actually, the delegation of power itself may be challenged. Section 23 of the Charter confers a social right (*infra*), which by definition imposes a corresponding duty on the state to implement the right. The courts have ruled that a delegation of absolute discretionary power in relation to censorship<sup>48</sup> and search and seizure<sup>49</sup> contravenes the Charter. With respect to education rights, the Court of Appeal of Ontario stated:

Any limitation placed on minority-language education rights cannot be left to the unfettered discretion of existing school boards no matter how competent and well-meaning those boards may be... The discretion that may be exercised pursuant to its provisions [the Education Act] is limited to one issue: looked at objectively, is the number of children of qualified parents sufficient to warrant the establishment of French-language instruction or facilities?

It is both interesting and helpful to note that the United States Supreme Court has developed the constitutional principle that the legislature may not grant administrative bodies an unfettered discretion to regulate constitutionally protected activities or to make decisions which directly affect the exercise of constitutionally guaranteed substantive rights. The court has developed the "void for vagueness" rule which requires legislatures to set reasonably clear and specific standards in circumstances where the grant of an unfettered discretion leads to arbitrary, discriminatory or otherwise unconstitutional restrictions upon guaranteed rights or imposes unnecessary inhibition upon the exercise of constitutional rights: see Smith v. Goguen (1974), 415 US, p. 566, Mr. Justice Powell, at p. 573; see also Shuttlesworth v. City of Birmingham (1969), 394 US, p. 147, Mr. Justice Stewart, at pp. 150-1.<sup>50</sup>

Dickson J., writing for the Supreme Court on the question of the discretionary power of an officer to make a seizure under the Combines Investigation Act, stated:

The appellants submit that even if section 10(1) and (3) does not specify a standard consistent with s. 8 for authorizing entry, search and seizure, they should not be struck down as

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48. Re Ontario Film and Video Appreciation Society et al. (1983), 41 OR (2d), p. 583, 147 DLR (3d), p. 58; *affd.* (1984), 45 OR (2d), p. 80, 5 DLR (4th), p. 766 (Ont. CA).

49. Hunter v. Southam Inc (1985), 55 NR, p. 241.

50. Supra, footnote 2, pp. 520-521.



inconsistent with the Charter, but rather that the appropriate standard should be read into these provisions... I would be disinclined to give effect to these submissions.

While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. Without appropriate safeguards, legislation authorizing search and seizure is inconsistent with s. 8 of the Charter. As I have said, any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.<sup>51</sup>

Although this decision dealt with a different right, the principle enunciated by the Supreme Court has a direct impact on all rights guaranteed by the Charter. Particularly in the field of education it is not sufficient to say that the discretion conferred on the school authorities permits them to make reasonable decisions adapted to the circumstances, and to establish classes or schools if they consider that the necessary conditions - which are not defined in the law - are met. If this were the case, we repeat that the inclusion of section 23 in the Charter would be a futile exercise, since it would add nothing to the existing provisions and structures. If we take the approach taken by the Supreme Court, any delegation of unfettered discretionary powers without regard to the provisions of the Charter in the field affected is inoperative to the extent that it is unconstitutional. Our analysis of education legislation has therefore been based on this premise. Since most such legislation delegates unfettered discretionary power to the school authorities in deciding whether or not to grant the right, or how to determine numbers, we have concluded that such legislation is unconstitutional. The purpose of the delegation of power is of considerable importance. Delegation of power over administrative matters will have an indirect effect only on the exercise of the constitutional rights of the linguistic minority. Delegation of power dealing with the decision itself, of whether or not to grant such rights, appears to be the most suspect. Thus we must define the substance of section 23, and the scope of the obligations that implementation of the section imposes. Any discretionary power relating to one of these obligations will contravene the Charter.

## 2. Sufficient numbers

The question of how to evaluate numbers arises in almost every province. It is closely related to the question of defining programs and pupil populations, attendance areas and school district boundaries. There is no lack of possible options. In some regions, a school district covers an enormous stretch of territory; in urban situations, five or six administrative units share the pupil

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51. Supra, footnote 49, p. 254.



population. Generally, it is a function of the department of education to define territories, and the department has the fullest discretion. Recently, there has been a tendency toward concentration, with a resulting flurry of mergers of small school units into large divisions. For official-language minorities, such mergers generally lead to a reduction of their demographic weight and the loss of administrative autonomy. The keynote is nevertheless flexibility, since the mobility of the population, undoubtedly something that will continue to increase, results in rapid reversals of the demographic balance of a region. How are we to reconcile the need for a margin within which to manoeuvre, the demands dictated by the rules of proper management of public funds, the structures of school financing, denominational rights and geographic dispersion of the minority group with the obligations imposed by the Constitution?

The answer lies in the concern for a balance between the rights of the minority and the responsibilities of the state.

With respect to numbers, we must seek a balance between these various factors, keeping in mind that a minority, by definition, needs additional services and greater effort on the part of the authorities. The Court of Appeal of Ontario considered that the imposition of an arbitrary number by law contravened the Charter, since such a standard ignored specific regional conditions. The court stated:

If any number is to be fixed as the minimum before French-language instruction is provided, that number should be justified by the legislature. It is uniquely qualified to demonstrate and provide the substantiation for the fixed number as being the appropriate one for the various districts in the province. To fix, without any justification, an arbitrary figure such as that of 25 and 20 set out by the Education Act contravenes the provisions of s. 23 of the Charter.<sup>52</sup>

The following provisions concerning numbers therefore appear to us to be unconstitutional:

- Prince Edward Island: 25 pupils over three consecutive grades
- Manitoba: 23 pupils per class
- Saskatchewan: 15 pupils per class over three consecutive grades
- British Columbia: 10 pupils.

On the other hand, Newfoundland, Nova Scotia and Alberta do not fix any number; the decision is therefore left to the discretion of the school authorities, school boards or minister. In Quebec, New Brunswick and Ontario, every pupil who requests instruction in French may obtain it. The establishment of classes and schools thus complies with the administrative standards in effect in the province: the pupil is transported to the establishment offering the services requested. The establishment is located where minority pupils may

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52. Supra, footnote 2, p. 521.

easily be brought together.<sup>53</sup> Thus the discretion does not really deal with the right to obtain instruction in the minority language, but rather with the procedures for implementing the right.

There are other factors at work in determining numbers. We know that the number required is not the same for instruction as for facilities: we also know that this number must not be calculated strictly within school district boundaries. On this point, the Court of Appeal of Ontario stated:

Further one might also draw attention to the fact that both pars. 3(a) and 3(b) refer to the "numbers warrant" test. The repetition in par. 3(b), even though in slightly different terms, would not be necessary unless the facilities there referred to are different from those included in the providing of instruction. It would appear, further, that a different numbers test might apply. Logically a larger number would be required for par. 3(b) than for par. 3(a).<sup>54</sup>

It has been argued by some that this distinction should not be made, and that if enough pupils of different grades can be brought together in a single place, they can have a school. Here they are undoubtedly thinking of, inter alia, an elementary school in a rural area with some 30 pupils in six or seven grades. In any event, the minimum number required for a school could be about 30 in this situation. There is no magic number that can be argued: low numbers like this will occur in very specific circumstances. With respect to territory, the Court of Appeal stated:

In any event, the strict geographical limitations imposed on school boards and thus the geographical limitations imposed upon their duty to provide French language educational facilities is inconsistent with s. 23 of the Charter.<sup>55</sup>

Nor are these boundaries immutable. However, these known criteria would have to be replaced by others, if provincial education legislation is to comply truly with the Charter. The task is a difficult one:

- a uniform number cannot be fixed for the province in the legislation, since this is an arbitrary procedure and does not respect regional conditions;
- the school authorities cannot be left free to decide the appropriate number, in their discretion;
- school district boundaries should not be used in the calculation.

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53. Supra, footnotes 37 to 39.

54. Supra, footnote 2, p. 527.

55. Id., p. 522.

What legislation, what procedure will provide us with an objective, efficient and rational method of determining the appropriate number? We shall set out several possibilities in our conclusion. For the moment, we would note that in our opinion, sections 15 and 23 taken together lead us to propose that any pupil whose parents qualify under the criteria set out in section 23 is entitled to receive instruction in the language of the minority; since this is the case in Quebec, Ontario and New Brunswick, and since we must ignore school district boundaries, it appears that all provinces must recognize the existence of this right.

But this alone is not enough: we must still have rules for opening classes and schools. The minimum number required for these purposes will, in our opinion, be lower than the general provincial standard - unless that standard varies around the same figures. It does not seem reasonable to require that a scattered population, timid and low in numbers, should be able to provide classes of 30 pupils and schools of 2000. The numbers will be lower than we have seen to date: they depend on the facts of each case. Classes of eight or even five pupils could be possible in regions where the minority is small and scattered, while elsewhere the provincial standard could be applied. The size of schools will also vary, depending on the situation: in an isolated area (Labrador, Whitehorse, northern Saskatchewan or Cape Breton, for example) minority schools will have lower attendance than in urban areas (such as St. Boniface, Westmount, Halifax or Edmonton). School legislation must recognize this diversity, and provide appropriate procedures for reflecting it, without sacrificing the right itself. The failure of present school legislation lies precisely in the lack of such procedures: either the statute imposes the numbers requirement, or it delegates full discretionary power to fix a number required. Neither of these methods is acceptable. School legislation must, in accordance with the Charter, recognize the existence of a right to instruction, to classes and to schools, and must establish parameters within which the right may be exercised. Judicial control over administrative decisions based on these parameters will be facilitated by the application of the usual concepts of administrative law, and such measures will avoid the undue multiplication of challenges in the courts. It will be recalled that the entrenchment of education rights requires that the legislature and the administrative authorities assume responsibility for creating a harmonious structure to implement minority-language education rights. Surely there is room for a middle road between complete duplication of the educational system and a refusal to recognize minority rights by using discretionary power to determine numbers.

### 3. The definition of French-language instruction - immersion and bilingual schools

Throughout this study, we have referred to the concepts of immersion and bilingual instruction. To a certain extent, these concepts intersect. Immersion is a program designed to provide intensive learning of a second language. It therefore uses the second language in teaching many or most subjects - varying from 50%



to 100% of instruction time. A pupil who is plunged into this environment learns not only the rudiments of another language, but also learns to master the language in acquiring knowledge. In general, immersion programs are primarily intended for members of the linguistic majority of a province who want their children to learn the language of the minority. Chief Justice Richard of the New Brunswick Court of Queen's Bench stated:

From the evidence presented at trial, as well as from the whole of the expert testimony, the following points emerge:

...

- (5) That immersion programs are set up for students who have no practical knowledge of the language of immersion...<sup>56</sup>

However, for a variety of reasons, we find throughout Canada - except in Quebec - that members of the linguistic minority attend these programs. It is very difficult to provide an exact count, since they are not identified as such. These francophones outside Quebec are therefore receiving instruction in French that is designed primarily for anglophones. The cultural element is absent. Can we imagine English Quebecers in English immersion? In our opinion, education legislation that does not distinguish between the pupil populations and programs in French immersion and the pupil populations and programs in French-language instruction is in contravention of section 23 of the Charter.

The expression "instruction in French" (in the context of francophones outside Quebec, since this problem does not affect Quebec) is used no less than seven times in section 23. The usual rules of interpretation would require that the expression be given the same meaning each time. If it includes immersion, then it would be constitutionally permissible to offer French immersion to francophones, rather than instruction in French, and in certain cases the combination of English - and French-speaking pupils in the same French immersion classes could be considered a reasonable limit under section 1, because it permits numbers to be combined to attain an acceptable minimum number. If it does not include immersion, then school boards must not offer such a program to replace a program in French; they must identify and separate the pupil populations for the two programs, and the departments of education, which are generally responsible for designing programs, must prescribe and provide firm outlines for a basic program in French. Does the Charter prevent francophones from continuing to send their children to French immersion classes, if they so want? We do not believe it does, but this question departs from the field of constitutional law, properly speaking. We do believe that the goal of section 23 was to give linguistic minorities the rights it entrenches in relation to instruction in their language, which rights also imply an environment and values transmitted through instruction: "Language is also the key

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56. R v. Cunningham (1983), 48 NBR (2d), p. 361 at 391-392.



to cultural development. Language and culture are not synonymous but the vitality of the language is a necessary condition for the complete preservation of a culture."<sup>57</sup> As a result, immersion cannot meet this objective. The Charter does not guarantee the right of francophones to French immersion.

In our opinion, the same is true of bilingual instruction, in which French- and English-speaking pupils together receive approximately equal proportions of their courses in French and in English. Instruction in French does not, in our opinion, mean a program where the proportion of French decreases from lower grades to higher grades, going from 100% in the primary grades to 60% in the last years of high school. It appears that this sort of instruction leads to a reduction in the quality of the language spoken by the minority, and even, in the medium term, to assimilation.<sup>58</sup> Thus bilingual instruction is contrary to the objective of section 23, which is to counteract assimilation. Whether bilingual instruction occurs within classes of francophones students or in mixed classes, it does not appear to us to comply with the Charter. This is not a limit, within the meaning of section 1, but a denial, within the meaning of subsection 24(1). The objective of such instruction - to preserve the pupil's bilingualism - appears to be legitimate within the meaning of section 1; however, the very means used, bilingual instruction, is not proportionate to this objective, since it leads to the reverse effect.<sup>59</sup>

We have analyzed provincial education legislation in relation to these premises. Most such legislation does not distinguish between the right to instruction in French and the right to immersion. On the basis of free access to all parents to instruction in the language of their choice, what we refer to as "freedom of choice in the language of instruction," most provinces permit school boards to group together pupils whose parents qualify under the Charter and the normal pupil population within the same classes and programs which combine both languages in order to accommodate both groups. We believe that these practices are among those the Charter was intended to remedy.

The Charter confers a right on parents who fulfil the criteria it sets out, to instruction in French and not to bilingual instruction or immersion. Access to schools protected by the Charter should therefore be controlled by those who are entitled to the right, and procedures should be set up to satisfy, first, the pupils whose parents qualify under the Charter and who no longer speak French, and secondly, those who do not qualify under the Charter but

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57. Royal Commission on Bilingualism and Biculturalism, Book 2, 1969, p 8.

58. Supra, footnote 56.

59. According to the analysis conducted by J. Deschênes comparing the reasonableness of the objective and the appropriateness of the means, supra, footnote 1.

who want their children to attend a French-language school. In New Brunswick and Ontario, pupils in the latter category are required to have sufficient knowledge of the language of instruction to be able to follow the courses without hindering the rest of the class.

#### 4. French-language schools

In addition to the problem of defining the pupil population and the program, which we have described above, we have the problem of defining the institution. The Association canadienne pour l'éducation de langue française (ACELF) proposes the following definition:

L'école française est un établissement qui dispense en français l'enseignement et les services aux élèves de langue maternelle française; elle est essentiellement l'institution que possède une communauté française pour transmettre sa culture par la formation intégrale de l'individu.<sup>60\*</sup>

A special committee of all Franco-Manitoban agencies involved in education (school trustees, teachers, parents, the SFM, the department of education French-language education bureau) working together under the designation "comité directeur" (steering committee) adopted the following definition:

L'école française (franco-manitobaine) est une institution qui regroupe des étudiants de langue et de culture française. Cette école vise le développement de français première et véhicule la culture canadienne-française. Elle a pour but de préparer les élèves de langue française à oeuvrer et créer en témoignant de leur identité particulière. Le français est la langue de communication interne et externe de l'école.<sup>61\*</sup>

Guidelines for the establishment of an Acadian school in Nova Scotia were issued in the fall of 1984, and define the distinctive role of the Acadian school as follows:

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60. Revue de l'ACELF, vol. XII, No. 3, December 1983, p. 5.

\* Translation:

A French-language school is an establishment which provides instruction and services in French to pupils whose mother tongue is French; essentially, it is a school belonging to a French-speaking community and used to transmit its culture through integrated development of the individual.

61. Comité directeur de la Fédération provinciale des comités de parents, Winnipeg, Manitoba.

\* Translation:

A French-language (Franco-Manitoban) school is an institution that brings together students whose language and culture is French. This school is designed to promote French as a first language and French-Canadian culture. Its goal is to prepare French-speaking pupils to be productive and creative as a function of their distinctive identity. French is the language of internal and external communication used in the school.

The distinctive role of the Acadian school in Nova Scotia is twofold: (a) to contribute to the maintenance and a better knowledge of the French language and the Acadian culture in the province and (b) to help the Acadians take full advantage of their linguistic rights.<sup>62</sup>

In Saskatchewan, the Commission des écoles fransaskoises proposed the following definition:

Fransaskois school means an education facility... having as its aim to provide programs which encourage the preservation and development of French-Canadian culture, heritage and social fabric.<sup>63</sup>

The following considerations are employed in Alberta:

A minority-language program shall address the educational and cultural needs of francophone Canadians. Schools offering the program will endeavor to develop a climate which fosters educational, cultural and linguistic growth in French... This program should also provide opportunities for the student to develop a sense of identity and of belonging to the French Canadian society in an official bilingual country and in a multi-cultural milieu.<sup>64</sup>

The definitions we have quoted all emphasize, to varying degrees, two proposed characteristics of a French-language school as it is conceived by francophones themselves: it is designed for children whose mother tongue is French, and it is intended to strengthen the minority group's cultural identity. The Court of Appeal of Ontario said of the second of these characteristics:

In the light of s. 27, s. 23(3)(b) should be interpreted to mean that minority-language children must receive their instruction in facilities in which the educational environment will be that of the linguistic minority. Only then can the facilities reasonably be said to reflect the minority culture and to appertain to the minority.<sup>65</sup>

There is a certain dichotomy between this objective, which relates to the substance of the right, and the categories defined in section 23, which relate to access to the right. Much has been made of the fact that section 23 makes no reference to the mother tongue of the children, and that only one category of parents - the first, in 23(1)(a) - must be French-speaking. Some English-speaking children therefore have a constitutional right to attend a

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62. Department of Education, Guidelines for the establishment of an Acadian school in the Province of Nova Scotia, 1984.

63. Section 1, proposal to amend the Saskatchewan School Act submitted by the ACFC.

64. Language Service Branch, Alberta Education - Implementing, monitoring and evaluating French and other language programs, 1984, p. 4.

65. Supra, footnote 2, p. 529.



homogeneous French-language school; according to the evidence presented in New Brunswick, coexistence of English- and French-speaking pupils under the same roof leads to linguistic interference and assimilation.

Thus we must reconcile the two demands, which appear to be contradictory, if we are to give effect to the intention of the framers of the Constitution. In this study, we have encountered various methods of doing this put forward by various governments and interest groups:

- unlimited access for children of parents who qualify under 23, access controlled by an admissions committee in the school for others;<sup>66</sup>
- unlimited access for francophones, access controlled by the school board for others;<sup>67</sup>
- access limited to children with at least one parent who speaks French;<sup>68</sup>
- access limited to children who communicate regularly with one of their parents in French;<sup>69</sup>
- complete, unlimited freedom of choice for all parents.<sup>70</sup>

It would appear that any condition that limits the categories defined in the Constitution would be invalid. The effects of the Supreme Court's decision in this respect remain to be seen. However, we have analyzed the legislation in question from the point of view of preserving the francophone character of the school. We therefore believe that education legislation should guarantee access to minority schools to children of parents who meet the criteria set out in section 23; if such children do not speak the minority language, provisions for special teaching should be made to provide them with this ability, but the Act, the Regulations and the guidelines should provide a definition for the school on the terms we have discussed above; to preserve the cultural identity of the members of the minority. Those who create the life of the school - teachers, principals, pupils - must agree, either voluntarily or by law, to respect the cultural goals of the institution, by speaking the minority language at all times and by advancing the cultural values of the minority.

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66. In Ontario, the Education Act, par. 260(6)(a), amended October 1964.

67. In New Brunswick, by virtue of the criterion established by J. Richard, supra, footnote 56.

68. In British Columbia, Circular 146.

69. Proposal to amend the Saskatchewan School Act submitted by the ACFC.

70. In Alberta.



We have noted various situations in which French-language and English-language programs or pupil populations were separate, but were grouped together in the same building. In our opinion, this option appears to be more in conformity with the Charter, but nevertheless contravenes the objective of a homogeneous school. It should not be seen as a legitimate option, except in circumstances where no other method is available to meet the demands of the Charter.

Finally, the quality of the facilities provided to the minority must comply with the notion of equality referred to earlier. In the appropriate proportion, the minority institutions must have available facilities that are comparable to those of the majority in the region: premises that are clean and in a good state of repair and fit for use, a gymnasium, cafeteria, video equipment, computers, and support services: psychologist, chaplain, infirmary, vocational guidance. The concept of management may be of use here to assist minorities to structure these services and to pool resources.

##### 5. Management of schools

Except in New Brunswick and Prince Edward Island, to a certain extent, no provincial legislation guarantees a minority the right to manage its schools. Even in Quebec, the system is now structured along denominational lines; the reform proposed in Bill 3, which would replace this system with one based on language, is being challenged on the basis of its effects on the denominational systems. In Ontario, the bill guaranteeing proportional representation died on the order paper and has not yet been replaced. In most western provinces and in Ontario, there are advisory committees which the school board consults on questions relating to French-language instruction.

Is management guaranteed in section 23 of the Charter? We have already expressed our doubts on this point.<sup>71</sup> The Court of Appeal of Ontario based its opinion on the wording of 23 (the definition of the term "établissement" in the French version, which includes a management structure, and the phrase "**de la minorité**," which gives the expression a possessive connotation) and on historical evidence, finding that participation in management of French-language instruction is guaranteed, and includes, as a minimum, autonomous control of French-language schools.

The court stated: "The history of education in this province emphasizes the importance of management and control by local school boards."<sup>72</sup> It concluded: "It is enough to assert that the Education Act, as it stands, is not in conformity with s. 23. Its provisions are not sufficient to ensure that minority-language educational facilities can objectively be considered as those of the

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71. Supra, footnote 6.

72. Supra, footnote 2, p. 531.

minority."<sup>73</sup> Since this is the only decision by any court on this point, we have analyzed education rights in relation to this requirement that they must provide procedures for controlling the minority facilities. The arguments advanced by the court arise out of the logic of a generous interpretation of section 23. The legislature must respect this limit on its jurisdiction. Legislation that does not meet this minimum test will be considered inoperative. Advisory committees with no autonomous decision-making power are not management structures. The form of control may vary from one situation to another, but again, the principle must be recognized and rational models must be developed so that we may reconcile respect for constitutional rights and rational administrative provisions.

### Conclusion

We have noted five deficiencies of the existing provincial education legislation: discretionary powers in the hands of school authorities; the determination of sufficient numbers; the definition of instruction in French and exclusion of immersion and bilingual instruction; the definition of a minority school and the problems of access by non-francophone children whose parents qualify under 23 and of other children, and of freedom of choice in the language of instruction and mixed schools; and the absence of management structures. Fundamentally, the inclusion of section 23 in the Canadian Constitution has resulted in a greater alteration to provincial education structures than had first appeared. The distinction among pupil populations and among programs, the new criteria for access to minority schools, and the requirement for management structures will require significant administrative and financial effort. Eventually, there will have to be pupil and resource transfers, and the creation of new models out of the existing structures. This administrative work will require the co-operation of everyone involved, and will go beyond the limits of this study. We shall establish here the legislative parameters of these reforms, but concrete implementation will have to be undertaken by those in the education field. The legislation developed to embody this work, however, will have to provide a clear expression of the objectives set out in the Constitution.

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73. Id., p. 533.



**III. The Nature of  
Section 23.**





It is difficult to establish the legal nature of section 23 of the Charter. The Supreme Court identified this problem clearly:<sup>74</sup>

Section 23 of the Charter is not, like other provisions in that constitutional document, of the kind generally found in such charters and declarations of fundamental rights. It is not a codification of essential, pre-existing and more or less universal rights that are being confirmed and perhaps clarified, extended or amended, and which, most importantly, are being given a new primacy and inviolability by their entrenchment in the supreme law of the land. The special provisions of s. 23 of the Charter make it a unique set of constitutional provisions, quite peculiar to Canada.

The Court of Appeal of Ontario rather emphasized the aspect of bilingualism:

Since 1867, the French and English languages have had official status in Canada. The charter has recognized bilingualism. Its provisions apply to both anglophones and francophones wherever they may reside. No doubt with a view to the future strength and unity of the country, it has made provision for minority language education rights ...

Prior to the passage of the Charter, the necessity of preserving the minority language and thus the culture of the minority by educational rights has been recognized. The Royal Commission on Bilingualism and Biculturalism stressed this principle. It has been observed that the Premiers' Conferences held in 1977 and 1978 unanimously recognized and stressed this concept. Section 23 of the Charter has given effect to this principle and made it part of the "supreme law of the land."

...

Section 23 of the Charter particularly must be given such a liberal interpretation for it enacts new rights and in effect creates a code which establishes minority-language education rights for the nation.<sup>75</sup>

We have already established that section 23 was intended to remedy the errors of the past as much as the weaknesses of present legislation and practice. The Supreme Court and the Ontario Court of Appeal have indicated that section 23 was a Canadian compromise reflecting the ideas that had been put forward by the Laurendeau-Dunton Commission. However, the real legal nature of section 23 has not yet been established by the courts or by legal writers. Does it entrench a collective right or an individual right? Is it a civil and political right or a social and cultural right? What are the roles of the courts, the legislature and the administration? If we can answer the first two questions the answer to the third will be easier, since if we understand section 23 of the Charter more clearly the real role of all the parties involved can be more clearly identified.

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74. Quebec Association of Protestant School Boards et al. (1984), 10 DLR (4th), p. 321 at 331.

75. Supra, footnote 2, pp. 517-518.

1. Civil and political right, or social and cultural right

The distinction between these two types of rights has been established largely on the international level. This distinction, however, is invaluable in defining a specific right and ensuring that it operates as intended.

Civil and political rights by their nature protect and guarantee the essential attributes of a human being. A state that enshrines these rights in a charter or declaration demonstrates that it has recognized them. However, it is up to the individual himself or herself to give these rights effect. Civil and political rights reflect a liberal philosophy of human rights. The state must do nothing that would prevent the individual from enjoying his or her rights, and any violation will immediately give rise to a legal remedy. They are self-sufficient and independent, and have effect even in the absence of any action on the part of the state, whether legislative, regulatory or administrative. These include our broad liberties, the prohibition of all discrimination and the granting of legal rights.

Economic, social and cultural rights take the other road: they contain a collective dimension, they do not exist inherently and independently, and they require a set of procedures for implementation. These include the right to work, to health care, to housing, to development and to education. It is not enough to proclaim the principle in a charter for it to be guaranteed in practice. The state must mobilize its entire legislative and administrative apparatus to create the infrastructures needed to implement these rights. A social right is a right that must be claimed,<sup>76</sup> while a civil right is a right that need only be exercised.

When the infrastructures are in place, a social right may be exercised and then takes on the characteristics of a civil right: any violation will immediately be sanctioned by the courts. Professor Proulx gave a clear explanation of how this distinction between a civil right and a social right applies to section 23:

Puisque l'article 23 ne donnera pas de droits susceptibles d'exercice immédiat aux minorités francophones à qui une province n'a pas déjà garanti concrètement ces droits par l'ouverture de classes, la construction d'écoles, voire la mise sur pied de Conseils Scolaires, peut-on encore les placer avec les autres droits fondamentaux reconnus par la Charte? N'y aurait-il pas

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76. "Droit de créance": Rivero, Les Libertés publiques, Paris, Thémis, 1973, p. 104.

plutôt lieu de suivre l'exemple du droit international et de bien démarquer la distinction de ces deux types de droits en les reconnaissant dans deux documents séparés?<sup>77\*</sup>

Professor Chevette was opposed to entrenching social rights in the Constitution:

Si importants qu'ils soient, les droits économiques et sociaux ne sont pas au nombre de ceux pour lesquels on souhaite une reconnaissance constitutionnelle. C'est probablement à juste titre, dans la mesure où ils n'ont un sens que précisé par la loi ou le règlement, et qu'il n'est peut-être pas souhaitable, dans notre tradition juridique, de constitutionaliser une disposition purement programmatique.<sup>78\*</sup>

Tarnopolsky, J., then Professor Tarnopolsky, was of like opinion on the question of language rights:

However, the provision of these rights requires a whole series of activities on the part of legislatures and governments, as well as private individuals and corporations, which it would be impossible to enforce in a court of law. These are the types of rights that can be proclaimed as an aim or goal of the state concerned. However, the enforcement of these rights can be achieved only through the ballot box, and not through a court of law.

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77. Proulx, supra, footnote 41, p. 342.

\* Translation:  
Since section 23 does not establish rights that may be exercised immediately by French-speaking minority groups where a province has not already given them concrete guarantees of these rights by opening classes and building schools, or even by establishing school boards, can we still put these rights on the same plane as the other fundamental rights recognized by the Charter? Would it not be more appropriate to follow the example set in international law and to distinguish clearly between these two types of rights, and recognize them in separate documents?

78. Chevette, Uniformité et efficacité des garanties en matière de libertés publiques (1979), 20 C de D, p. 95 et 109.

\* Translation:  
Important though they be, economic and social rights are not in the same class as those that we want to have in our constitution. It is probably not desirable in our legal tradition to entrench a provision that is purely a matter of programming and that has no substance until it is given form in legislation or regulations.



In considering group rights such as those of language, culture and education, it is necessary to recognize the limitations upon constitutional guarantees.<sup>79</sup>

We have already expressed the opinion that section 16 of the Charter, which entrenches the two languages' equality of status, rights and privileges, could be interpreted as defining a right that may be enforced by means of the remedies provided in section 24 of the Charter.<sup>80</sup> Nonetheless, language rights, like all education rights, are in the nature of a social right. Any judgment that confers a right to education in the language of the citizen must be supplemented by concrete measures: pupils will have to be brought together, teachers trained and hired, programs developed, premises located, material purchased and funds allocated. However, the inclusion of section 23 in the Charter and, most of all, its co-existence with subsection 24(1), means that this is a legal right that can be enforced. Since there is a constitutional remedy for a violation of education rights, they have gone beyond the stage that had been reached in the St. Andrews Accord,<sup>81</sup> and have become true civil rights. Implementation of these rights will vary, however, depending on the provincial or regional situation. In New Brunswick, section 23 has already been given effective, concrete form in a complete, integrated minority-language education system. In Quebec, the legal existence of such a system is enshrined in Bill 3, the proposed education reform. In Ontario, section 23 has resulted in a broad expansion of homogeneous schools, and the needs of each minority community will determine the demands it makes. To define the education rights set out in section 23 as civil rights is to misconstrue their social nature; but to define them as social rights is to strip them of their legal effects. We must therefore conclude that section 23 is a kind of hybrid. Neither of these two aspects may be neglected without damaging the other. We cannot claim that language rights are not inherent to the person: language and culture are intimately related. Can we argue that by virtue of Article 27 of the International Covenant on Civil and Political Rights, minority-language rights have acquired the status of civil rights? If we look at them that way, they would mean that the state must do nothing to impede exercise of the rights. Section 23 of the Charter goes further: it is not limited to prohibiting the provinces from preventing minority-language communities from opening private schools, but rather it entitles them to facilities financed by public funds. There is no doubt that they are social rights, but it also can not be denied that they are legal rights. This dual nature demands that we reassess the traditional role assigned to the courts, and we shall examine this aspect in our third section. Before doing so, we shall consider the question of whether section 23 rights are individual or collective.

79. J. Tarnopolsky, "Equality Rights," in Beaudoin and Tarnopolsky, Canadian Charter of Rights and Freedoms, Montreal, Wilson and Lafleur, 1982, p. 553.

80. Supra, footnote 44.

81. "The provinces will make their best efforts to provide minority language instruction wherever numbers warrant."

## 2. Collective right or individual right

Professor Proulx observed that subsection 23(3) makes section 23 rights collective:

Or le critère numérique auquel est assujetti chacun de ces droits fait incontestablement de ceux-ci des droits collectifs. En effet, sans l'existence d'un groupe suffisamment nombreux d'individus, ces droits n'existent tout simplement pas.<sup>82\*</sup>

Deschênes, J., on the other hand, considered them to be individual:

Un droit peut être accordé à des individus en tant que membres d'un groupe sans par là devenir un droit collectif; ainsi l'exercice individuel de ce droit milite puissamment à l'encontre de la qualification collective. Les minorités linguistiques dans les provinces ne constituent pas des entités juridiques; cela va de soi mais elles ne constituent pas non plus des entités auxquelles la Charte aurait reconnu des droits qu'elles pourraient revendiquer collectivement. C'est aux individus, citoyens canadiens et membres d'une minorité, que la Charte reconnaît des droits en matière de langue d'instruction: c'est à ces individus qu'elle ouvre la porte des Tribunaux en cas de violation de leurs droits. Il semble bien qu'il s'agisse, dans l'article 23, de droits individuels plutôt que de droits collectifs.<sup>83\*</sup>

82. Supra, footnote 41, p. 349.

\* Translation

The numbers test that each of these rights must meet indisputably results in the rights being seen as collective rights. Unless there is a sufficiently large group of individuals, these rights simply do not exist.

83. Quebec Association of Protestant School Boards, supra, footnote 1, p. 691.

\* Translation

A right may be granted to individuals as members of a group, without it thereby becoming a collective right; thus the individual exercise of this right is a strong argument against considering it to be a collective right. Minority language groups in the provinces are not legal entities - that goes without saying; but nor are they entities to which the Charter has granted rights that they may assert collectively. The Charter grants rights to individuals, to Canadian citizens who are members of a minority, in respect of the language of instruction: it is to these individuals that it opens the doors of the courts if their rights are violated. It seems clear that section 23 concerns individual rights rather than collective rights.

Professor Chevrette indicated his scepticism about this distinction:

L'expression "droits collectifs" n'est pas un terme de l'art et il est assez significatif que ce soit à la fois dans le vocabulaire du philosophe politique qu'on la retrouve et non dans celui du juriste technicien. La raison en est probablement que le qualificatif "collectifs" accordé au mot "droit" renvoie au fondement philosophique de ceux-ci beaucoup plus qu'à leur appartenance légale ou à leurs modalités judiciaires d'exercice.<sup>84\*</sup>

Two writers were of the opinion that collective rights require collective action to enforce them.<sup>85</sup> Since section 24 and section 23 appear to identify persons rather than groups, Deschênes, J. was correct in considering these as more in the nature of individual rights.

By contrast, section 93 of the Constitution Act, 1867 guarantees truly collective rights: they must be claimed by a group or by members of a group; this is one of the rare examples of collective rights in our Constitution.<sup>86</sup>

The Supreme Court of Canada relied on the collective nature of section 93 in support of the proposition that the rights it guarantees are for the benefit of the

84. Chevrette, Les concepts de droits acquis, droits des groupes et de droits collectifs, in Rapport de la Commission d'enquête sur la situation de la langue française et sur les droits linguistiques au Québec, Book II, 1972, p. 422.

\* Translation:

The expression "collective rights" is not a term of art, and it is just as meaningful when it is found in the vocabulary of a political philosopher as in that of the legal expert. The reason is probably that the qualifier "collective" applied to the word "rights" has much more to do with the philosophical foundations of rights than with the question of who enjoys them in law or of how the law provides for them to be exercised.

85. Y. Dinstein, Collective Human Rights of Peoples and Minorities (1976), 25 International and Comparative Law Quarterly 103; Ben-Israël, Is the right to strike a collective right? (1981), 2 Israel Yearbook on Human Rights, p. 200.

86. G. Beaudoin, Le Partage des Pouvoirs, 2nd ed., Ottawa, University of Ottawa Press, 1982, p. 217.



members of the classes it affects, which are religious groups,<sup>87</sup> rather than for the benefit of their school trustees. The court concluded that a requirement that the trustee hold a referendum before levying a school tax in excess of a certain amount was not in violation of section 93:

The principle of a referendum itself is not in my view such as to constitute an infringement of the taxing right, making the legislation unconstitutional. There is no limit on the taxing right. It is only that the legislator has thought it proper to confer a supervisory power on persons who, in fact, are members of the class of persons whose rights are protected. I adopt the following passage from the reasons of Vallerand, J.A., dissenting in the Court of Appeal ... (translation):

It is true that beyond certain taxing limits the impugned legislation provides for recourse to a referendum, and that appellants argued that this is such a serious obstacle that for all practical purposes it constitutes an impediment. I cannot share their anxiety. In fact, I have the impression that the alleged constitutional guarantees are being claimed for representatives and mandataries against their electors and mandators, who are the sole beneficiaries of those guarantees.<sup>88</sup>

The court based its opinion on a study by Professor Carignan, who stated:

The constitutional protection exists for the benefit of the religious communities ... Accordingly, commissioners and trustees are only the representatives of a real beneficiaries. Moreover, if one refuses to lift the veil of legal entity and regards the school boards as the ultimate holders of the taxing right, since the latter do not constitute a class of persons they are not in a position to invoke the constitutional protection.<sup>89</sup>

In his dissent, Le Dain, J. ascribed a different meaning to the concept of collective rights as applied to education:

I would also agree that the rights contemplated by s. 93(1) of the Constitution Act, 1867, may be characterized as "collective rights" ... although such characterization does not necessarily by itself yield obvious answers to the issues that arise under this provision of the Constitution. What the characterization does suggest, however, is that it is the interests of the class of persons or community as a whole in denominational education that is to be looked at and not the interests of the individual ratepayer.<sup>90</sup>

87. Mackell, supra, footnote 14.

88. Supra, footnote 18, pp. 117-118.

89. P. Carignan, De la notion de droit collectif et de son application en matière scolaire au Québec, Centre de recherche en droit public, Faculté de droit, Université de Montréal, September 1984, to be published, pp. 132-133. Quoted by the Supreme Court, supra, p. 119 (as translated by the Supreme Court).

90. Supra, footnote 18, p. 127.



Thus, since the rights involved are individual rights, Le Dain, J. would have taken into account the individual interests of each person rather than the interests of the group in determining whether a provincial statute is constitutional. Chouinard, J. also examined the interests of the group in a case of collective rights.

With respect to language rights, it is customary to distinguish between the concepts of territoriality and personality.<sup>91</sup>

This distinction has a certain similarity to the issue with which we are concerned here. The principle of territoriality ties the language regime to a defined territory; all the residents in that territory would be subject to the regime. If the territory is linguistically homogeneous, this principle reinforces the rights of the group itself, since it has a guarantee that its language will be protected within that territory. Moreover, minorities are then destined to assimilate. The principle of territoriality thus does not benefit members of the linguistic minority in a territory. The principle of personality ties the language regime to the individual. In theory, he or she has the same language rights throughout the entire territory of the state. If we apply this principle in the Canadian context, it would permit great mobility by the population but would diminish strength of the minority as a whole, since it could not hope to enjoy language rights outside those places where it is concentrated in large enough numbers to justify provision of the necessary services. This is to some extent the approach taken in section 23; it does not confer rights on official-language minorities as a group. Section 23 can be contrasted with, for example, section 2 of the Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick:

The Government of New Brunswick shall ensure protection of the equality of status and the equal rights and privileges of the official linguistic communities and in particular their right to distinct institutions within which cultural, educational and social activities may be carried on.

Despite its lack of any enforcement mechanism, this provision, like section 93 of the Constitution Act, 1867, identifies the group as the holder of the rights guaranteed. Section 23 rather identifies the individual. However, is the numbers test set out in subsection (3) not then a collective right, as Professor Proulx contends? The right to instruction in one's language must be exercised by several people if the section is to be coherently applied. Moreover, the primary goal of section 23, the preservation of minority groups in the country by maintaining their educational facilities, gives us an indication of the implicit intention of

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91. McRae, The principle of territoriality and the principle of personality in multilingual states, (1975), 4 International Journal of the sociology of language, pp. 33-54.

92. RSNB, 1973, c. 0-1.1.

the framers of the Constitution to confer protection on the minority language community, by granting rights to the members of the groups. As a result, section 23 must be seen in its collective context, particularly when we look at the question of homogeneous schools, program content and management. Inclusion of section 23 in the Charter as an individual right makes it possible for judges to ensure compliance with the individual's right, but this right can only be understood in a collective context. Without going so far as to argue that section 23 enshrines a collective right, which would be false, we must recognize the collective impact it has.

This duality in the nature of section 23 - legally, an individual, personal, civil right, but in substance a collective, territorial and social right - demands that we look at the respective roles of the various people and bodies involved.

### 3. The role of the courts

By enshrining a set of fundamental rights in the Constitution, the framers modified the balance of power among our state institutions. In the education sector, the private preserve of the legislature and the administrators, increased judicial activism will have undeniable effects on the behavior of the other partners in education. All the legal authors have noted in their own way that we need an activist approach by the courts if social rights are to be reflected in reality, when the legislative, regulatory and administrative infrastructures still have not complied. Professor Proulx expressed his scepticism:

Évidemment, même si ces recours ultimes sont légalement possibles, personne ne peut affirmer que les tribunaux voudront engager une lutte à finir avec une administration provinciale. Fournir l'enseignement dans une langue donnée implique de nombreuses actions administratives: fourniture de locaux, d'administrateurs, de professeurs, de manuels, de subventions, de moyens de transport, etc. Or, ces décisions ne sont pas toutes prises au même palier dans l'administration scolaire et certaines peuvent être du ressort du gouvernement lui-même.

En d'autres mots, c'est une guérilla politique qui peut s'ensuivre entre les tribunaux et l'administration provinciale et cela, il n'est pas sûr que nos tribunaux, même justifiées par l'existence de la Charte constitutionnelle, prennent le risque de s'y lancer. Du moins l'histoire judiciaire canadienne, empreinte de réserve en matière de droits et libertés, nous enseigne qu'il faut éviter ici un "enthousiasme" précipité.<sup>93\*</sup>

93. Supra, footnote 41, p. 365.

\* Translation:

Clearly, even if these ultimate remedies are legally available, no one will argue that the courts will want to undertake a battle to the death with the provincial governments. Providing instruction in a specific language involves a host of administrative acts: providing premises, administrators, teachers, textbooks, grants, transportation, and so on. These decisions are not all made at the same level in the education administration, and some may be within the competence of the government itself.

In other words, we could see a political guerilla war between the courts and the provincial administration, and we cannot be sure that our courts, even with the constitutional Charter as their justification, would take this risk. At least, Canadian legal history, stamped as it is with reserve in its approach to rights and freedoms, tells us that we must avoid a too eager enthusiasm here.

However, we may be able to envisage a new judicial dynamism: "Maintenant que la Charte canadienne des Droits et Libertés est une Charte constitutionnelle, les juges ne devraient plus manifester la timidité qui caractérisait leur interprétation de la Déclaration."<sup>94\*</sup> It appears that the remedy of a mandatory injunction may be well adapted to the problems that may arise in implementing section 23:

If provincial governments are recalcitrant, or if the implementation process breaks down, courts will be faced with a totally new situation in constitutional law. They will have to exercise judgment heretofore reserved to the legislature and administration. It is a responsibility of the utmost importance ...

If provinces, municipalities and school boards refuse to implement the guarantees of section 23, the Courts will have to do it for them. This may require a new and unique arsenal of mandatory and injunctive remedies to compel the establishment of classes, the construction of schools, and the expenditure of public funds.<sup>95</sup>

Professor Gibson takes the same approach; dealing with the availability of injunction as an equitable remedy under subsection 24(1) of the Charter, he states:

Equitable remedies are always discretionary, and the tendency to deny orders requiring detailed supervision has involved nothing more than a discretionary declination by courts to make orders which, as a practical matter, would be very difficult to enforce. But, as an Australian authority on equitable remedies points out, it is a question of degree: as the importance of injunctive relief increases in particular situations, the reluctance of Courts to undertake supervisory responsibility decreases. Few legal matters are as important as compliance by governmental authorities with constitutionally entrenched safeguards. It may well be, moreover, that American experience, which has shown continuing judicial supervision to be less difficult than previously supposed, will persuade Canadian Courts that innovative uses of injunctions to protect against serious Charter violations are as feasible, in appropriate circumstances, as the protection is important.<sup>96</sup>

The courts, however, have not answered this appeal, at least not in respect of section 23 of the Charter. It is true that, without directly invoking this provision, the courts have recently made orders against school boards: to open an immersion class,<sup>97</sup> to transmit a request for a French-language class to the

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94. A. Tremblay, Précis de Droit constitutionnel, Montreal, Ed. Thémis, 1982, p. 198.

\* Translation:

Now that we have a constitutional Charter of Rights and Freedoms, our judges should not demonstrate the timidity that characterized their interpretation of the Bill of Rights.

95. Magnet, supra footnote 4, p. 216.

96. D. Gibson, "Enforcement of the Charter," in Tarnopolsky and Beaudoin, supra, footnote 79, p. 506.

97. Pernisi v. Swan Valley ST (1982), 18 Man. R (2d), p. 409.



minister,<sup>98</sup> to reconsider a refusal by two school boards to transfer pupils from one jurisdiction to another,<sup>99</sup> to cancel a discriminatory guideline.<sup>100</sup> However, the judgments of the New Brunswick Court of Queen's Bench, the Court of Appeal of Ontario and the Supreme Court of Canada reflect the courts' concerns about the nature of the social right conferred by section 23. Richard, J. stated:

Put simply, the court is confident that this decision will be respected by the defendant and, consequently, the court will refrain from deciding this question for a period of six months.<sup>101</sup>

The Court of Appeal of Ontario was even more explicit. It twice refused to legislate:

In this reference we are not required to set out specifically the details of what would be required of the Ontario legislature in amending the Education Act to comply with s. 23 of the Charter ... Moreover, the Charter does not dictate a specific method to be applied to achieve its objectives and satisfy the guarantee of s. 23(3)(b). It is enough to assert that the Education Act, as it stands, is not in conformity with s. 23.

...

We note that, subject to the Charter and s 93 of the Constitution Act, 1867, education in the province is a provincial matter. The Legislature has exclusive power to make laws in relation to education and to establish a system for the management thereof that it deems suitable to conditions in the province. Section 23 limits this power in respect to minority language education.<sup>102</sup>

Later, in reference to the application of section 23 to the separate schools, the court made a statement that, while obiter, should be noted:

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98. R ex rel. White et al. v. Bd. of T. of Prince Albert RC Sep. SD No. 6 (1981), p. 6 Sask. p. 109 R.

99. Bareham v. Board of Education for the City of London, (1984) 3 OAC, p. 335.

100. Bachman v. St James-Assiniboia SD No. 2 (1984), 29 Man. R (2d), p. 66.

101. Supra, footnote 56, p. 409.

102. Supra, footnote 2, pp. 532-533.



The judiciary is not the sole guardian of the constitutional rights of Canadians. Parliament and the provincial Legislatures are equally responsible to ensure that the rights conferred by the Charter are upheld. Legislative action in the important and complex field of education is much to be preferred to judicial intervention. Minority linguistic rights should be established by general legislation assuring equal and just treatment to all rather than by litigation.<sup>103</sup>

In the Bill 101 case, the Supreme Court refused to give any practical effect to its declaration that Chapter VIII of Bill 101 was unconstitutional, and in that case did not have to do so. Professor Proulx interpreted its approach as follows:

Tirant simplement les conséquences logiques d'une déclaration d'inconstitutionnalité de la clause-Québec, on demandait à la cour si le paragraphe 23(3) de la Charte avait pour effet d'obliger le gouvernement du Québec à allouer aux Commissions Scolaires les fonds publics nécessaires à l'intégration des immigrants anglo-canadiens dans les écoles anglaises ...

La portée de cette question n'était pas anodine. Elle aurait ultimement entraîné la Cour à fixer des obligations positives au gouvernement, voire au législateur, ce qui aurait nettement tranché avec les traditions en matière de contrôle judiciaire de constitutionnalité ...

Or un tel activisme judiciaire, on en conviendra, chambarde considérablement l'idée qu'on se faisait jusqu'ici du rôle des tribunaux. On constate que ces derniers en sont très conscients et que compte tenu de l'impact non négligeable de ce nouvel aspect "directif" de leurs fonctions, ils

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103. Id., p. 547.

n'emprunteront cette voie, si jamais ils le font, qu'avec la plus grande circonspection.<sup>104</sup>

We tend to share this point of view. Questions relating to education are always best settled at the political level rather than by the courts. Litigation may have a major effect, but it does not settle all the problems.<sup>105</sup> It would be preferable for the authorities to understand their obligations under the Charter and act on them in a positive way. The courts appear to be disposed to leave the provincial legislatures with room to manoeuvre.

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104. D. Proulx, La loi 101, la clause-Québec et la Charte canadienne devant la Cour Suprême: un cas d'espèce? (1985), 16 RGD, p. 167 at 192-193.

\* Translation:

Simply drawing the logical consequences from a statement that the Quebec clause was unconstitutional, the court was asked whether subsection 23(3) of the Charter had the effect of requiring that the Quebec government allocate the necessary public funds to the school boards so that English-Canadian immigrants could be integrated into the English-language schools ...

This is not an insignificant question. It would ultimately have required the court to impose mandatory obligations on the government, possibly even on the legislature - which would have been clearly contrary to traditional elements of judicial control over constitutional questions ...

It will be agreed that this kind of judicial activism would quite upset the idea that we have had up to now about the role of the courts. We know that the courts are very conscious of the part they play, and that they will not embark on this path, in view of the considerable impact such a new "directive" approach to their functions could have, without thoroughly examining the possible consequences.

105. Foucher, supra, footnote 6, pp. 152-153.



#### **IV. Denominational Rights and Language Rights**





Five out of 10 provinces, not counting the two territories, provide for denominational separate schools. New Brunswick, Nova Scotia, Prince Edward Island, Manitoba and, to some extent, British Columbia, are not subject to this obligation.<sup>106</sup> The Renaud<sup>107</sup> and Barrett<sup>108</sup> cases, which were seen as defeats at the time, had unforeseeable effects: because of them, it is easier today to restructure the school system in accordance with the new demands of section 23 of the Charter. All the other jurisdictions must find some way of reconciling the two constitutional guarantees into a whole. The task is not an easy one, as the latent disputes in Ontario and Quebec demonstrate. Those provinces that are subject to section 93 of the Constitution Act, 1867, have generally adopted the model of separate schools based on a dissentient religious minority within the territory of a public school board. Francophones have used the separate system, particularly in Ontario, to establish distinct institutions that they can control themselves. A few concrete examples will assist us in determining the importance of the interaction between sections 23 and 93.

In Edmonton, a French-language Catholic school has just been opened.<sup>109</sup> It accomodates 200 pupils. What can be done by the few parents who want their children to have a non-denominational French-language education, who are not numerous enough to have a public school or a class in a public school?

In Montreal, there is a desire to reduce the territory of the denominational school boards, cutting off 80% of their present pupil populations.<sup>110</sup> Is this a denial of the rights protected by section 93 of the Constitution Act, 1867?

In Ottawa-Carleton, Catholic Francophones attend their own schools up to grade 8, and then continue their secondary education in public French-language secondary schools.<sup>111</sup> Full funding for grades 9 to 13 in Catholic schools will undoubtedly decrease the pupil populations in public secondary schools, to the benefit of Catholic secondary schools. For example, there is a danger that instead of one secondary school with 500 French-speaking pupils, there will be two secondary schools with 250 pupils each. How are these schools to be managed, if Francophones are a minority on both the public school board and the separate school board?

Before we attempt to answer these questions, we should review the effects and scope of section 93 of the Constitution Act, 1867, and the various aspects of this issue that arose in our study of the provinces.

1. Method of establishing schools, numbers tests

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106. See the province-by-province analysis.

107. Supra, footnote 11.

108. Supra, footnote 13.

109. École Maurice Lavallée.

110. Bill 3.

111. As a result of the Tiny case, supra, footnote 15.

Method of establishing separate schools follows a similar rule in all the provinces. A relatively small number of parents hold a meeting, and invite parents of the same faith, the minority of the residents in the school district. The purpose of the meeting is to establish a denominational school board and determine the territory of the board, and to hold an election for the first trustees. In general, the minister or the Lieutenant-Governor-in-Council then must establish a school district, if the vote is positive. This procedure applies only to a religious minority, and not to any religious group: we have yet to see how it will relate to section 23 of the Charter. We might conceive of such a procedure for dissent for the linguistic minority in a region as one of the means of implementing section 23. The procedure is not of any use, however, in bilingual regions or in regions where the linguistic minority in the province constitutes a majority of the population of the region.

## 2. Access to the schools

Separate schools are reserved for the members of the religious minority in a district. In practice, the student population is determined rather by choice, so that a ratepayer may support the public system or the separate system, presumably according to his or her religious faith. In practice, when there is a separate school district in a territory, all those who declare themselves as members of the religious minority must send their children to the separate schools, which is logical. Residence criteria are also established: only a person who resides in the separate school district will have the right to send his or her children to the separate schools.

## 3. Substance of the right to manage

The right to manage belongs to the members of the religious minority, and not to the trustees.<sup>112</sup> This right does not include the right to determine the language of instruction,<sup>113</sup> but in the absence of any provincial regulation on the point<sup>114</sup> or when the regulation or the Act delegates this function,<sup>115</sup> the school boards may decide the language that will be used in the schools.

The right of minorities to manage their schools, protected under 93, is composed primarily of the right to elect trustees to manage the schools.<sup>116</sup> This right appears to be fundamental, and any educational structure in a province that is subject to this constitutional restriction must provide for it.

But what is the substance of this right? In general, education legislation merely provides that the board of trustees will have the same rights as a public school board. Thus there is a truly dual school system: all the rights given by law to the public school boards are automatically conferred on the separate school boards.

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112. Cf, Greater Hull School Board, supra, footnote 18.

113. Cf, Mackell, supra, footnote 14.

114. Newfoundland.

115. Alberta, British Columbia, Manitoba, Nova Scotia, Prince Edward Island.

116. Ottawa ST v. City Of Ottawa, [1917] AC, p. 76.

Francophones in Ontario were quick to see the potential benefits in a dissentient system, and made frequent use of it. Thus there is a large proportion of francophones on the separate school boards, and in some cases they constitute a majority. This situation presents a problem in reconciling 23 and 93, because the rights of minorities are only indirectly protected by a division of responsibilities along denominational lines. In practice, we find both francophones and anglophones managing schools that are first Catholic and secondly language-based. Thus whether the schools are managed by one language group or the other, or both, depends solely on the chance configurations of the political scene of the moment, the candidates, the division of the electoral districts, tradition, and other considerations that are sometimes very far removed from the language question.

The right to manage extends to the denominational nature of the school: thus it includes defining a Christian educational project in developing programs of instruction. The Supreme Court implicitly recognized this principle in Caldwell. It held that the requirement that a teacher comply with the religious standards of a denominational school was a "bona fide occupational qualification" and that a teacher who breached these standards could be disciplined. The court stated:

The Board (at first instance, a board of inquiry under the Human Rights Code, RSBC, 1979, c. 186) found that the Catholic school differed from the public school. This difference does not consist in the mere addition of religious training to the academic curriculum. The religious or doctrinal aspect of the school lies at its very heart and colors all its activities and programs. The role of the teacher in this respect is fundamental to the whole effort of the school, as much in its spiritual nature as in the academic. It is my opinion that objectively viewed, having in mind the special nature and objectives of the school, the requirement of religious conformance including the acceptance and observance of the Church's rules regarding marriage is reasonably necessary to assure the achievement of the objects of the school.<sup>117</sup>

While this opinion is not based on section 93 of the Constitution Act, 1867, since "the rights of denominational schools in British Columbia were very limited at the time of Confederation. It has been said that they were limited to the right to exist (see Audrey S. Brent, The Right to Religious Education and The Constitutional Status of Denominational Schools (1974-75), 40 Sask. L. Rev. p. 239) ... "<sup>118</sup> it does give us some indication of the Supreme Court's approach to conditions of employment that are tied to the schools' denominational status.

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117. Caldwell v. Catholic Schools of Vancouver Archdiocese (1985), 56 NR, p. 83 at 95-96; Cf., Clément-Séguin v. AGQ, supra, footnote 17.

118. Id., p. 99.



The right to manage also includes control over books and materials and over the hiring of teachers. Control includes the establishment of conditions directly related to religion; but does it extend to the teachers' private lives? We can be confident that it does not, since 2(b) (freedom of religion) and 15 (equality rights) of the Charter would have the effect of neutralizing conditions of this nature. Some decisions have held them to be valid,<sup>119</sup> but it has also been held that collective agreements may contain voluntary renunciations of the guarantees<sup>120</sup> and that the labor relations law that ordinarily applies in the schools would apply in the denominational schools.<sup>121</sup> The Supreme Court nevertheless gave serious recognition to the legitimacy of conditions of employment founded on religion, and tied such conditions directly to the denominational nature of the schools and their need to protect their unique character.<sup>122</sup>

Since the denominational nature of the schools is to be protected, there must also be conditions established for the admission of pupils: religious exercises; religious instruction; and a religious atmosphere which will permeate the denominational schools. Mandatory school attendance, together with the concentration of francophones in the Catholic schools - or anglophones in the protestant schools - may lead to situations in which a minority of parents who are not numerous enough to support a non-denominational school but do not want their children to receive a denominational education must choose between denominational instruction in their own language and public instruction in the majority language. A parent in Windsor who wants to send his or her child to the French Catholic school, the only French-language institution in the city, but who does not want the child to take religion courses, might decide to seek an exemption; the Catholic school board would refuse the exemption, on the grounds that religious instruction is one of the essential courses that pupils in a Catholic school must take. The reverse situation - parents who want religion courses in the public schools - arises much less frequently.

We find ourselves here on the horns of the dilemma faced by religious and linguistic minorities. Can a pupil be educated in his or her own language without the presence of religious overtones? Must francophones outside Quebec, who are the ones most directly affected by the problem, given their low numbers and the fact that they tend to concentrate in religious schools, sacrifice their religion to preserve their language? How can we respect both the right of Catholics to manage their own schools and the right of francophone parents to obtain non-religious

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119. Re Essex County RC Sep. SB and Porter (1977), 78 DLR (3d), p. 417, aff'd. (1978), 89 DLR (3d), p. 445 (Ont. CA).

120. Re Essex County RC Sep. SB and Tremblay-Webster et al. (1983), 142 DLR (3d), p. 479, aff'd. (1984), 5 DLR (4th), p. 665 (Ont. CA).

121. RCSB Exploits-White Bay et al. (1983), 147 DLR (3d), p. 186 (N.W.T. CA).

122. Caldwell, supra, footnote 117.

French-language education for their children, given that language and religion in our society no longer coincide? Equal recognition of the two rights will lead to fragmenting of the potential francophone pupil population, which is already small, and could eventually result in one or both of the two groups - French-speaking Catholics and public school supporters - not having sufficient numbers under 23(3)(b) to maintain their schools.

If we are to rationalize the rights of these two minorities to manage their own schools, we might propose, as did Professor Hogg,<sup>123</sup> that there be a language-based school board with public and separate sections, rather than a denominational school board with language-based sections. However, this kind of reorganization would completely upset provincial education structures, and the denominational schools do not seem to favor the idea: witness the battle of the Commission des Écoles catholiques de Montréal and the Protestant School Board of Greater Montreal against school reorganization in Montreal; the battle of the Ontario separate school boards against the requirement that they have a French-language structure within their own boards; the reticence of the Catholic school boards of Ottawa and Carleton to enter into an agreement with francophones on the public boards to provide for joint management of new French-language Catholic separate secondary schools; the religious conflict between Catholics and Protestants in Ontario; and the conflict between the public and separate school boards in Calgary over allocation of corporate taxes. Where there are enough potential pupils, coexistence of a public and Catholic system for francophones would completely comply with sections 23 and 93. However, demographic realities make this solution rather unlikely. There will have to be a compromise between the two groups, and whatever the compromise is, it will have to respect constitutional rights, both linguistic and religious. As we have seen, however, the legislature has considerable latitude: so long as the rights of religious groups (and not of their managers) are not prejudicially affected, the authorities are permitted to reorganize school structures. The procedures established for creating French-language school boards and homogeneous French-language schools in Ontario, Saskatchewan, Alberta and Newfoundland and the territories must respect the right that is generally granted to religious minorities to elect trustees, determine access to Catholic or Protestant schools, provide for the hiring of teachers and define the religious education project. If a majority of the religious minority in a school district is French-speaking, as may happen on occasion, should not the rights of the non-Catholic francophones be respected by providing procedures for religious exemption? As long as non-Catholic francophones do not have sufficient numbers to demand separate institutions, this will be the only manner of ensuring that their rights under section 23 of the Charter are respected. Are the rights of Catholics prejudicially affected by this? They would clearly be diminished, since a Catholic school would have to distinguish between religious and non-religious pupils, so that the denominational purity of the school would be lost, there would be administrative difficulties with respect to taxes and the school would be more difficult to manage.

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123. P. Hogg, L'Ontario a le pouvoir d'établir un Conseil Scolaire de langue française, Télé-Clef, 1985, No. 1, p. 25.

We shall return to the range of possible options in our conclusion, but we should first outline the nature of this serious problem.

#### 4. Separate school funding

In almost all the provinces, the separate school systems are entitled under the Constitution and the applicable education legislation to funding from three primary sources: government grants, school taxes and, in some cases, tuition fees.

The Supreme Court established a principle for Quebec that could easily be transposed to the other provinces: grants should be made on a proportional basis.<sup>124</sup> The proportion allocated to the separate system in relation to the public system should generally be determined according to school attendance. This objective, measurable criterion is supplemented by giving consideration to the budgetary requirements of each system. Taxes are used to raise funds in addition to those granted by the government. Corporate taxes are paid according to an objective formula.<sup>125</sup>

How does section 23 interact with this system? Section 23 provides for access to "public funds," which must be taken in the broad meaning. If non-Catholics are to attend Catholic French-language schools there will be a complex taxation situation. The tax structure is determined on the basis of religion, and separate school supporters do not pay the same tax rates as public school supporters. Moreover, the right to tax appears to be protected by section 93, since there must be practical provision for exercising the right to maintain denominational schools: a set of powers and adequate financial resources. The same comment may be made about schools protected under 23(3)(b), so that there is a problem of how to divide the scarce available resources between two minority language groups, both of which have equal constitutional protection: Catholic school supporters and non-denominational school supporters. Neither of the two rights can be given precedence, and so we must find ways of reconciling them.

The courts have recognized that section 93 was a collective right<sup>126</sup> while section 23 was an individual right<sup>127</sup> (although legal authors have differed on the latter point).<sup>128</sup> If this be the case, the group of French-speaking Catholics must not lose their right to instruction in their own faith, but any French-speaking individual remains entitled to an education in his or her language, wherever there is available a large enough group of francophones. Consequently, each of the two groups may exercise its rights, in the spirit of the limits imposed by subsection 23(3) and section 1, in each of the three possible configurations of circumstances:

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124. Greater Hull School Board, supra, footnote 18.

125. Calgary Board of Education v. AG Alberta (1980), 106 DLR, p. 249 (Alta. CA).

126. Supra, footnote 18.

127. Quebec Association of Protestant School Boards, supra, footnote 1.

128. Proulx, supra, footnotes 41 and 104; Carignan, supra, footnote 89.



- 1). a. Catholic francophones are in a minority in a region, but have sufficient numbers to support their own schools. The public and Catholic schools can coexist;
- b. Catholic francophones are in a minority in a region, and have insufficient numbers to support a school: they can be transported to the closest French-language Catholic school, or to an immersion or mixed school, or they can be integrated into the public schools and given religion courses. This last scenario, however, would affect their right to have their own trustees and their own distinct facilities, but the management structure could be changed to accommodate these requirements;
- 2). a. non-religious francophones are in a minority in a region but have sufficient numbers to support a school: each of the two facilities can survive;
- b. non-religious francophones are in a minority in a region, and have insufficient numbers to support a school: they can be integrated into a mixed English-language public school or an immersion school, or transported to the nearest French-language public school, or integrated into a French-language Catholic school and exempted from religious instruction. This last scenario appears to be the most reasonable;
- 3). a. each of the two groups is numerically equal in a region, and is sufficient to support separate schools: each of the two facilities can survive;
- b. each of the two groups is numerically equal in a region, but has insufficient numbers to support separate schools: the reasonable solution appears to be to integrate them into a single institution and to organize religious instruction for those wanting it.

In addition to these general, hypothetical considerations, we have examined each situation on its merits in the light of the principles found in the case law. We must hope that the various communities will themselves settle this thorny problem in the best interests of both the linguistic and the religious minorities. It would be unfortunate, at the least, if two minority groups ended up in the courts litigating two important constitutional provisions.

English-speaking Montrealers seem to be setting about doing just this. Despite the consensus that Alliance Quebec has reached in relation to Bill 3, Montreal Protestants are challenging its validity on the basis of section 93 of the Constitution Act, 1867. If they are successful, English-language schools in Montreal will remain Protestant, and there will have to be some accommodation for anglophones who want their children to receive a non-denominational education - although the educational project of the Protestant schools does not put as much emphasis on the religious aspect as do the Catholic schools. There will also have to be accommodation for English-language Catholic schools, which are managed by francophones: will they go over to the Protestant system, or will they remain in the Catholic system? The logic of section 23 leads us to favor the first



suggestion - unless the whole concept of denomination is to be replaced by language as the primary criterion for the division, or English-speaking Catholics obtain independent management structures.

These questions are closely tied to the question of funding. The provincial tax structures, under section 93, provide for school taxes on the basis of denomination as a method of school funding. Any reorganization of the school system could affect the funding structure. If we bring the non-religious population into the denominational schools, they will undoubtedly have to pay the appropriate taxes; the same is true if we bring the denominational population into the public schools. If the public and denominational systems continue to coexist, but within a single language-based management structure with a denominational section in order to comply with section 93, the tax pie could be dealt with as a whole, leaving the denominational sector free to collect additional taxes for its schools if necessary.

The details of these arrangements will have to be studied in detail by provincial education authorities, since provincial funding of schools through grants is based in part on school tax rates and attendance levels in both systems. If the non-religious population is integrated into the denominational system, or vice versa, the financial effects will have to be planned carefully.

### Conclusion

Any reform of provincial education legislation along the lines that we will set out in the next section must take into account the four factors we have just examined. Section 23 must be interpreted in a broad, liberal and remedial manner, so as to strengthen the minority culture and promote equality. For this purpose, we have set out five aspects of the general scheme of education legislation we believe do not comply with section 23: delegation of unfettered discretionary powers, numbers tests, definition of French-language instruction, definition of French-language schools and the absence of management structures. Efforts to correct these defects must take into account the dual nature of section 23 rights: individual, civil rights which may be enforced by the courts, and also collective, social rights which require action on the part of the government and therefore a rethinking of the role of the courts in dealing with the legislatures, and will also require political action by those wishing to assert their rights. Such efforts will also have to take into account the denominational rights protected by the Constitution, and the problems caused by integrating the linguistic and religious aspects of a minority. The task of implementing section 23 is therefore the responsibility of everyone involved, rather than of the legal system alone. Up to now, the only provinces that have provided acceptable responses are Quebec, New Brunswick and, to a certain extent, Ontario.

This movement may extend into other provinces. In the Maritimes, no great change is required to bring the legislation into line with the Charter. In the west, considerably more work is needed. In the last section, we shall attempt to set out the objectives and methods required for such reform, in a sufficiently general form that it may be transposed to each province. But first, we must examine the impact of section 1.

V. Impact of  
Section 1  
on  
Section 23



The impact of the first section of the Charter on section 23 is not easily determined. The Court of Appeal of Ontario breathed not a word on this point; the Bill 101 case alone offers us a few points for consideration, but they are in fact of limited application since the case concerned a problem that is not shared by francophones outside Quebec. The Bill 101 case dealt with two clauses that appear to be contradictory: the Canada clause (par. 23(1)(b) of the Charter) and the Quebec clause (s. 73 of Bill 101). The Superior Court adopted a concept that we find difficult to articulate: the distinction between denying and restricting a right; the court found that section 1 could not apply, but nevertheless examined section 1 obiter. The Supreme Court of Canada did not base its decision on this distinction, but also did not apply section 1; this was primarily because section 23 was enacted specifically to correct Bill 101, and the framers of the Constitution had felt that Bill 101 was not a reasonable limit; and secondly because Bill 101 amended section 23, and section 1 cannot operate to authorize an amendment to the Constitution. Since this was the reasoning of the highest court of the land, it must be closely examined. Other authors have written that it will not have any effect beyond the case in question;<sup>129</sup> we believe that this reasoning, which avoids applying section 1 to language education rights, will have only limited effect on the other sections of the Charter, but that it may apply to other aspects of section 23 than simply access to schools.

While Bill 101 was truly, in the words of the Supreme Court, the "prototype of the regimes" to be remedied, can we conclude that other school legislation is not just such a prototype - for example, legislation that delegates to school boards the discretionary power to decide whether the number of children in its territory is sufficient by virtue of 23(3)(b) to open a school - and therefore that such a provision would be seen as a reasonable limit? As well, in the opinion of some writers, section 1 requires that the validity of a statute be considered by a court in relation to the criteria set out. When the Supreme Court adopted an interpretation that was extremely similar to the famous "frozen concepts" theory that developed during the period when the Canadian Bill of Rights was being interpreted, it did not consider whether the Quebec clause was reasonable limit: it held that the framers of the Constitution believed that the Quebec clause was not a reasonable limit. If we apply this concept to other Canadian school statutes, which of them can we say the framers did not consider established reasonable limits? In applying section 1, must we distinguish between statutes adopted before the Charter came into effect (at the moment, all school legislation falls into this category) and statutes adopted after that date? Would those in the first category be exempted from section 1, because the framers of the Constitution intended to remedy them? If we combine this reasoning with the analysis of the Court of Appeal of Ontario, which was based on the setbacks suffered by the minority both historically and more recently, we must conclude that the remedial effect of section 23 takes precedence over the effects of section 1.

In fact, section 23 has an undeniably remedial effect, for the moment, on all school legislation. The goal of the framers of the Constitution, as we have frequently noted, was to add rights, to correct the existing school legislation and the way in which it had been applied. We find it difficult to see how it could be

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129. Proulx, supra, footnote 104, severely criticized the judgment, as it applies to Quebec. Outside Quebec, however, the judgment does not have the same political implications ...



argued that section 1 justifies the five main defects in almost all provincial school legislation: confusion between immersion and French-language instruction, delegation of absolute discretionary powers, imposition through legislation or regulations of an arbitrary number to be the same throughout the province, the absence of provisions for establishing homogeneous schools, and the absence of management structures. In Quebec, section 23 was intended to remedy the problem of access to English-language schools; outside Quebec section 23 remedies the remaining problems. Section 1 cannot apply to these situations.

The second criterion set out by the Supreme Court was that Bill 101 derogated from the Charter; this arose from a more technical approach to the Constitution Act, 1982: the interaction of sections 1, 33 and 38. Section 1 permits Parliament or a provincial legislature to restrict rights; section 33 permits it to derogate from such rights, to suspend the operation of the Charter in specific cases; and section 38 permits the substance of the Charter to be amended according to the amending formula. The Supreme Court has distinguished among these three possibilities. Section 1 does not permit amendment to the Charter nor complete exemption of a statute from the operation of the Charter.

Since Bill 101 conflicts directly with section 23 of the Charter, in that it affects one of the essential characteristics of section 23 - the definition of who is entitled to the rights set out therein - Bill 101 is clearly either an amendment, which is forbidden by virtue of sections 38 et seq., or a derogation pursuant to 33 - and section 33 may not be used to derogate from section 23. In fact, the Supreme Court somewhat confused the definition of who is entitled to the right and of the substance of the right. Would it apply the same analysis to the substance? If it would, we might infer that any statute that alters or permits the alteration of the substance of the right - for example, the concept of instruction in the language of the minority, or of minority language educational facilities, management or sufficient numbers - would be a derogation from section 23, an amendment to its substance. For this reason, we believe that it is imperative that we distinguish between the substance of the right and the manner in which it is to be implemented. However, even if we make this distinction, the substance of the right could be affected evidence of how similar matters are treated in other jurisdictions, as well as extrinsic evidence dealing with the objectives of the legislature and the effects of the legislation.

Application of these criteria to the unconstitutional factors discussed here does not, in our opinion, make them more acceptable. What legitimate objective is a legislature pursuing when it puts English- and French-speaking pupils in the same class, and provides them with instruction partly in French; or when it does not distinguish between pupil populations; or between programs for learning a second language and programs for teaching children in their mother tongue which is the official language of the minority; or when it does not provide for homogeneous schools for the minority or permit the minority to manage its schools?

It may be seen that two closely connected objectives are used as the basis for this kind of limit: economic rationalization and administrative rationalization. The first of these two objectives is already dealt with in subsection 23(3), which provides that where there are a sufficient number of pupils to justify the expenditure of public funds, this number having been determined on the basis of criteria that we shall consider in a later section, the province may not shield itself behind a financial argument, since this aspect of the issue is already

covered by the test enunciated in 23(3). The second objective, administrative rationalization, however noble it may be, appears to be better attained by a system of separation along language lines than by integration of minority facilities with the majority structures, except perhaps with respect to the joint provision of certain services. Thus at first glance the objectives themselves appear to be difficult to justify. The same may be said of the means: most of the means we have identified as suspect impose a burden on the minority that seems to be disproportionate to the objective. Just as the Quebec clause<sup>130</sup> appeared to the Superior Court to be excessive, the dilution of education rights and the use of compromise formulas on the very essence of these rights is excessive: it does not abolish assimilation, it perpetuates it.<sup>131</sup>

Thus, even if we try to apply section 1 to section 23, we find that the measures we have examined must be considered unconstitutional. At the present stage of this debate, if a limit is to be reasonable it must provide effective protection for minorities, in order to give by section 1: the right itself could be restricted. But it cannot be affected in such a way as to affect the substance, because if it could this would mean that Parliament or a legislature could effect a constitutional amendment or suspend the operation of section 23 in its own jurisdiction.

This criterion is similar to the denial/restriction dichotomy articulated by Deschênes, J., and leaves us feeling just as unsatisfied. When is a right restricted, and when is it amended? If we restrict the right to vote, we do not affect the substance of that right: what we are doing, in effect, is limiting the people who enjoy the right. However, if we limit the right to homogeneous schools, and agree to accept mixed schools, are we affecting the essence of section 23, are we amending the right to homogeneous schools? We believe that this question must be answered in the affirmative. This concept of linguistic and cultural insecurity is central to the expectations of minority groups for section 23.

Once again, this discussion illustrates the fundamental difference between section 23 and the other rights in the Charter. We can "limit" a civil right without great difficulty: we can restrict the manner in which it may be exercised, we can suspend it in exceptional circumstances, we can make its operation subject to certain conditions. This can be done because a civil right can be claimed in its entirety from the moment it is conferred. But we cannot limit a social right, which does not yet exist, and which must be implemented. There is nothing to be limited, because there is no right. Thus, we cannot limit the right to a French-language school by replacing it with the right to French immersion: this is not the right that has been guaranteed. If the right to a French-language school is set out in the law, and if there is a French-language school in place, then, and only then, can we begin to talk of "limits" on this right.

Of course a number of legal writers, like Deschênes, J., believe that the rights guaranteed in 23 may be limited. Some believe that discretionary powers, minimum numbers, the choice between homogeneous schools and other remedial measures (such as transport, bilingual instruction and immersion) are reasonable limits.

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130. Section 73 of Bill 101.

131. Finn-Elliott Report on restructuring the New Brunswick education system, 1979.



If we presume that section 1 applies to these questions (which we strongly doubt, as we have just explained), it is not sufficient to state that this is so; it must be demonstrated. The burden of proof is on the government, and it is here that the test set out by Deschênes, J. in the second part of this decision<sup>132</sup> may be of some use. The court must assess the legitimacy of the objectives pursued by the legislature and determine whether the means used by the legislature are proportional to the objectives. To do this, the court requires effect to section 23. Subsection 23(3) already imposes restrictive criteria, although we do not yet have a definition of how these criteria will be applied. Any reasonable limits must relate to these criteria, which provide the means for implementing the right. The very substance of the right cannot be subject to limits, since if it were the very essence of the provision would be violated.

Section 23 must be examined in light of the structure of the section itself, which we considered in the introduction: criteria for eligibility for the rights; the nature of the rights guaranteed (instruction and instructional facilities); and application of these rights. There is a crucial distinction to be made between a limit placed on a right, and an actual denial of a right. In support of the argument that the legislation we have considered is valid, it has been said that the limits imposed are reasonable and may be demonstrably justified in a free and democratic society. In the Bill 101 case, the Superior Court of Quebec (and the Supreme Court of Canada, implicitly) established a distinction between a limit and a denial. The Supreme Court indicated that legislation could not operate so as to amend section 23, since the only available mechanism for amendment is found in section 38 et seq. of the Constitution Act, 1982. When a statute, a regulation or even a guideline amends the substance of section 23, the instrument in question must be considered to be inoperative. For example, an educational program that requires 30% to 40% of teaching time to be in the language of the majority does not, in our opinion, amount to a limit: it is a denial of the right to instruction in the minority-language. A provision in a statute establishing an advisory council for instruction in the minority-language, rather than a management structure, is not a limit on the right to participate in management, but a clear denial of that right. We must first establish a difference between the substance of section 23 itself and the implementation of the section. In our opinion, section 23 must be interpreted as having national substance based on the rules of interpretation referred to earlier. It establishes a regime of general application throughout Canada, as the Supreme Court correctly stated. Thus the concepts of "instruction in French" and of "minority-language educational facilities" are constitutionally recognized. A French-language school is a French-language school everywhere in Canada. A bilingual school or an immersion school is not a French-language school. However, the size of the school, the attendance area, and the student population to be served may all be subject to limits and may vary from province to province. The limits will operate in the implementation of these concepts: the numbers requirement as established in subsection 23(3) and the practical terms of implementation.

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132. Supra, footnote 1.

**VI. Legislative  
Reforms**





It was not a difficult task to discover that in fact very little provincial education legislation meets the requirements of section 23 of the Charter. Although it is difficult to develop a general scheme for legislative solutions to the problem, such solutions appear to be the best means of organizing the education system in each province to comply with its constitutional obligations. We do not intend to rewrite each of the relevant provisions, but we shall establish a general outline for use as a guide by provincial legislatures which are seeking to comply with the Constitution. This outline will have to provide the flexibility that will be needed if it is to be adapted to situations that vary from place to place and time to time, while at the same time providing a basis for effective constitutional protection. Provincial legislatures were able to adapt to section 93 of the Constitution Act, 1867, and over the years the procedures for establishing separate schools have not changed much from province to province. Could they not just as easily develop a comparable scheme to enable the linguistic minority to exercise its rights?

We shall first try to identify the objectives that the required reform of legislation and regulations must meet. Secondly, we shall try to specify in greater detail what concrete elements must be included in these reforms. Finally, we shall discuss the steps that must be taken to begin the reform and to carry it through. The two central provinces, Quebec and Ontario, are attempting, as we write this, to implement educational reorganizations relating to both denominational schools and language rights. They are encountering resistance - perhaps predictable, but nevertheless regrettable. The suggestions we present will have to take into account, to a certain extent, the linguistic and religious atmosphere in a province, since there will have to be public discussion of any legislative amendment. We presume that such discussion will be calmer than those that took place a few years ago. A couple of strong judgments from the highest court in the land might provide some motivation for the movement. We shall concentrate on principles by keeping our suggestions on a reasonably general note, and not risk rapid obsolescence: constitutional principles are supposed to last for a long time.

## 1. Objectives of reform

Any reform of provincial legislation and regulations must first attempt to comply with the criteria set out in section 23 of the Charter, adapting them to the practical situation in the province. We will have to devote some time to this duality: the abstract proclamation of education rights could be adequate compliance with section 23, but would be of little use for a minority language community in need of schools and services. On the other hand, in Ontario and Quebec for example, there are educational services available but without complete legal guarantees, so that we cannot presume that the mechanisms already in place enjoy the security conferred by legislation, which is by definition general, impersonal and durable. Thus we must consider that the primary objective of reform, to implement stable procedures and structures, will go hand in hand with a consideration of the provincial and regional circumstances.

### 1) Clarifying roles and responsibilities

The first objective appears to us to be of overriding importance: to clarify the functions of each instrument in the legal framework, and the responsibilities of each person and body involved. We shall first examine these definitions, and

then review the substance of the legal instrument and the direction it should provide. To this end, the following table provides a summary of the characteristics of the various instruments available:

Instrument	Act	Regulation	Guideline	Decision
Author	legislature	government	minister	school board
Nature	general, impersonal	details	precision	individual cases
Function	state law, provide outlines, delegate powers	establish criteria	organize the system	operate the system
Substance	definitions of rights: instruction, facilities, management structures	criteria for establishment of facilities	programs, methodology	decisions and implementaton

Each of these instruments requires some explanation. By its very nature, the Constitution can only set out a very general principle:<sup>133</sup> it is a higher law than ordinary legislation, and the ordinary laws must operate so as to implement and give form to its provisions. The role of the legislature is therefore to provide explicit recognition of these rights. An Act is still general, impersonal, and flexible in its application;<sup>134</sup> it must not become involved in detailed descriptions. The function of the Act is to provide an overall organizational structure for the school system, including linguistic and religious minority systems.

The Constitution, the supreme law of the land, grants to each of these two minorities the right to have and manage their own schools. The legislature must integrate this requirement with a coherent organization of the provincial territory, so as to provide such instruction out of public funds. Some provinces will opt for complete duality, others will prefer to compromise; some provinces will authorize local taxes, others will finance the system centrally; some provinces will delegate much of the responsibility to the school boards, others will delegate functions to the minister of education, and others still will provide for these details by regulation. There is not, and there should not be, a uniform approach; but the legislation, which is the expression of the will of the elected representatives, must contain a minimum of provisions that comply with the Constitution.

133. Brun and Tremblay, Droit Constitutionnel, Montreal, Ed. Yvon Blais, 1982, pp. 12-13.

134. L.P. Pigeon, Rédaction et interprétation des lois, Quebec City, Éditeur officiel du Québec, 1965.

Among the various legal instruments available to the state authorities to set these standards, Regulations are a favored option. In most Canadian jurisdictions, there are ten times as many Regulations as statutes. A Regulation is of the same legal value as a statute,<sup>135</sup> but its advantages are well-known. It is a means of providing for various technical details,<sup>136</sup> often determined in consultation with the sector affected;<sup>137</sup> it can be amended rapidly and without the public discussion that surrounds the legislation process.<sup>138</sup> A Regulation is a subordinate instrument, and so must follow the path set in the legislation. It is a delegated legislative power, and any attempt to exceed that power which is not authorized by the enabling provision will be stricken down by the courts,<sup>139</sup> and no regulatory power may be sub-delegated unless such sub-delegation is authorized.<sup>140</sup> The practice in Prince Edward Island<sup>141</sup> and Saskatchewan<sup>142</sup> of granting to the school board, in the first case, and the minister, in the second, the discretionary power to decide questions that should be determined by the Regulations themselves appears to us therefore to be illegal.<sup>143</sup> Few provinces have used Regulations effectively as an instrument for providing for minority-language education rights. Quebec,<sup>144</sup> Ontario<sup>145</sup> and New Brunswick<sup>146</sup> have used Regulations to provide details on some provisions of their legislation. Prince Edward Island and Saskatchewan have adopted Regulations that appear to us to be ultra vires and unconstitutional, in that they sub-delegate discretionary powers to the school boards or the minister. A regulation that accompanies legislative provisions on minority education rights should, in our opinion, specify the criteria for decisions, and provide a process for making such decisions. In some cases, this function has been performed by

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135. Pepin and Ouellette, Principes de contentieux administratif, p. 65; Hoffman-La Poche et Co. v. Secretary for Trade and Industry, [1975] AC, p. 295 at 341.

136. Dussault and Borgeat, Traité de droit administratif, vol. 1, p. 387.

137. Garant, Droit administratif, p. 406, recommends that there be wider consultation in the regulatory process.

138. Dussault, supra, note 136, p. 388.

139. Id., p. 405.

140. Id., p. 533.

141. Regulation under the School Act, RSP.E.I., 1974, c. S-2.

142. Reg. 118/79.

143. Vic Restaurant Inc. v. City of Montreal, [1959] SCR, p. 58.

144. Regulation under the Charter of the French Language.

145. RRO, 1980, Reg. 80-262.

146. Reg. 81-156.



issuing guidelines - for example in Nova Scotia,<sup>147</sup> Alberta,<sup>148</sup> British Columbia<sup>149</sup> and the Yukon.<sup>150</sup>

The legal status of such guidelines in relation to the enabling statutes is already unclear, and becomes even more complicated in relation to section 23 of the Charter. These guidelines are indications given to the school boards (that vary as to how binding they are on the boards) of the will of the government concerning the powers delegated by law to the school boards to decide requests to open French-language classes or schools. The guidelines in Nova Scotia and Alberta specify the content of the program once the school is established; those in British Columbia and the Yukon define the process as well as the content of the program, and are part of the Regulations.

The texts and case law now indicate clearly that a guideline is internally binding on the administration, but has no legal standing that would be subject to sanction by a court, and cannot be relied on by either the administration or those subject to its jurisdiction.<sup>151</sup> However, this doctrine applies to true directives, or guidelines for the conduct of a superior hierarchical authority guiding the actions of a subordinate authority. Some authors and decisions<sup>152</sup> have indicated that guidelines are mandatory, and have thereby considered them to be similar to regulations by virtue of their normative, general, impersonal substance and their apparent directive force, and the fact that they were adopted pursuant to an express enabling provision in the legislation.

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147. Guidelines for the Establishment of Acadian schools, Department of Education, 1984.

149. Circular 146, Department of Education, B.C., 1979.

150. Guideline 7230, Rev. 2, Department of Education, 1985.

151. Texts: Dussault, supra, footnote 136, pp. 423-431; Pépin and Ouellette, supra, footnote 135, pp. 66-73; Garant, supra, footnote 132, pp. 288-290; Garant and Issalys, Loi et règlement, pp. 46-60; R. Barbe, La Règlementation, pp. 16 et seq. Cases: Martineau and Bertkers v. Inmate Discipline Committee of Matsqui Institution (No. 1), [1978] 1 SCR, p. 118; Maple Lodge Farms Ltd. v. Government of Canada, [1984] 2 SCR, p. 2; Re Vanden Bosch and Minister of Health (1973), 30 DLR (3d), p. 81 (Man. CA); Re Rothmans of Pall Mall Canada v. MNR (1976), 67 DLR (3d), p. 505 (FCA); AGBC and Parkland Private Hospital Ltd. and The City of Vancouver, [1975] 2 SCR, p. 47; Commission Scolaire de Chambly v. PG Quebec, [1977] CS, p. 143; Harel v. Deputy Minister of Revenue of Quebec, [1978] 1 SCR, p. 851; Capital Cities v. CRTC, [1978] 2 SCR, p. 141; Sarachan v. Commission des Valeurs Mobilières du Québec, [1974] RL, p. 462.

152. Inter alia, Protestant School Board of Greater Montreal v. Attorney-General of Quebec, J-/ 78-600; Association des Gens de l'Aire v. Lang, [1978] FC, p. 371; Danch v. Nadon, [1978] 2 FC, p. 484; MNR v. Creative Shoes, [1972] FC, p. 993.

Garant states: "Il importe de faire remarquer que certaines lois récentes contiennent une habilitation expresse à édicter des directives ou instructions. Lorsque ces directives contiennent des normes à portée générale et impersonnelle, ce sont de véritables règlements."<sup>153\*</sup> Pépin and Ouellette go further: "toutefois, si une directive prend son origine dans une loi délégatrice et si son contenu, normatif, vise un nombre déterminé de personnes, il devient difficile cette fois de démontrer que l'on n'est pas, en réalité, en présence de mesures réglementaires, quelque soit le nom officiellement donné à la décision (décret, arrêté, instructions, directives, etc ...)."<sup>154\*</sup>

Garant and Issalys, in a particularly apt commentary, state that if we make a mutually-exclusive distinction between Regulation and guideline, and only the former is considered to have legal effect, we permit the administration to decide what force its normative rules will have. They go on:

Par conséquent, un texte à vocation normative et à caractère général et impersonnel, établi par l'administration en vertu d'une habilitation précise, serait considéré comme un règlement, même si - pratique peu souhaitable à notre avis - il est désigné par un autre terme que "règlement". Par ailleurs, aucun texte de cette nature établi en l'absence d'habilitation précise ne pourrait être qualifié de réglementaire. Cette démarcation rigoureuse nous paraît nécessaire à la remise en ordre de la fonction législative de l'administration. Pour qu'elle ne joue pas au détriment des administrés, le législateur devrait exiger que toute disposition générale et impersonnelle visant à modifier ou à protéger la situation juridique des administrés soit réservée à la loi ou au règlement. Serait par conséquent illégale toute norme de cette nature établie par voie de directive. Le domaine propre de celle-ci serait donc effectivement ramené à l'encadrement de l'activité intérieure

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153. Supra, footnote 137, p. 290.

\* Translation:

It is important to note that some recent legislation contains an express enabling provision authorizing the issuance of guidelines or instructions. When such guidelines contain standards of general and impersonal effect, they are true Regulations.

154. Supra, footnote 135, p. 69. See also Barbe, supra, footnote 151, p. 22.

\* Translation:

However, if a guideline originates from legislation that delegates powers, and if its normative provisions affect a specific number of people, it is now difficult to argue that we are not really faced with a Regulation, whatever name is officially given to the decision (order, decision, instructions, guidelines, and so on).

de l'administration au moyen de textes à fonction d'interprétation, d'orientation ou de prescription technique.<sup>155\*</sup>

Only Dussault and Borgeat state unequivocally that guidelines do not have legal effect over third parties, their only effect being to provide for internal disciplinary action against recalcitrant officials who disobey them, or budgetary sanctions against agencies that do not follow their guidelines. Dussault and Borgeat argue that the effect of guidelines is limited to internal matters, in order to guide and govern the conduct of subordinates. They conclude: "Que la directive soit obligatoire ou non, sa violation comme telle ne fait pas l'objet de sanction judiciaire. Les tribunaux n'interviennent pas pour sanctionner l'application d'une norme qu'ils jugent de nature et de portée essentiellement administrative."<sup>156\*</sup>

At least one of the guidelines in question here appears to be a matter of internal departmental control over school boards, while three appear to be normative Regulations (B.C., Yukon, N.S.) and the policy statements of Alberta and Manitoba set out the government's thinking. How should we deal with these texts in relation to section 23 of the Charter? We have established that section 23 imposes an obligation to enact legislation. Existing legislation is inadequate in that it delegates discretionary powers to administrative authorities; however these authorities exercise their discretion by issuing guidelines, the substance of which is normative and impersonal but which neither individuals nor the government is bound to obey, although school boards would be subject to internal sanction if they disobeyed. Does this pattern fulfil the obligation to enact legislation? Are guidelines subject to section 23?

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155. Supra, footnote 151, pp. 59-60.

\* Translation

As a result, a provision which is normative, general and impersonal, established by the administration pursuant to a specific enabling provision, would be considered to be a Regulation, even if it is designated by some term other than "regulation" - a practice that is to be discouraged, in our opinion. Moreover, no provision of this sort that is established in the absence of a precise enabling provision could be considered to be a regulation. This strict distinction appears to us to be necessary if the legislative and administrative powers are to be kept in order. To ensure that a general, impersonal provision intended to change or protect the legal rights of those under its jurisdiction not operate to their detriment, the legislature should require that it be in the form of a regulation. As a result, any provision of this nature established by guideline would be illegal. The proper application of guidelines would therefore be effectively limited to directing the internal activities of the administration by provisions of an interpretive, directional or technical nature.

156. Supra, footnote 136, p. 425.

\* Translation:

Whether or not the guideline is mandatory, violation of the guideline itself will not be subject to sanction by the courts, which will not intervene to sanction the application of a rule that they consider to be essentially administrative in substance and effect.



We believe that whether or not issuing directives fulfils the obligation to enact legislation depends on the legal standing that a court would ascribe to such guidelines. We saw earlier that in some cases the courts have given full effect to guidelines issued under an express enabling provision in the legislation which sets out norms for such guidelines. If we follow this tendency in the cases, when these two criteria are fulfilled - and we believe that they are in three of the four cases studied here - the guidelines are rules of law that are closer to being Regulations. The obligation to enact legislation is fulfilled, and the guidelines are "law" within the meaning of section 1 and subsection 52(1) of the Charter. Thus guidelines can be considered to be "reasonable" limits" if the other criteria set out in section 1 are fulfilled - which, for the reasons set out in section V, we doubt - and guidelines can be challenged by an action seeking a declaration that they are inoperative, since as "laws" they are subject to the supremacy of the Constitution Act, 1982, set out in subsection 52(1).

If, on the other hand, we follow the tendency put forward by Dussault, guidelines are only internal documents and are not "laws." They do not fulfil the obligation to enact legislation, and no declaratory judgment can be granted against them. Does this mean that they are not subject to the Charter? Here we must distinguish among the obligation to enact legislation, the primacy of the Charter and a violation of the provisions of the Charter. The obligation to enact legislation, in our opinion, arises from the social and collective nature of the right to minority-language instruction. Legislation is required in order to give effect to these rights: the legislature cannot remain passive in the face of the responsibility imposed on it by the Constitution. When laws are adopted, they fall under the formal supremacy of the Charter, and they may be found to be incompatible with it, but if there is no law in the strict sense of the word, section 23 of the Charter will nonetheless have an effect; if a guideline contravenes section 23, the guideline is an administrative act of the government, to which section 23 applies as a result of subsection 32(1) of the Charter. If such an administrative act infringes or denies the rights guaranteed in 23, it may be the subject of any remedy the court may consider just in the circumstances, by virtue of subsection 24(1), which does not exclude an action for a declaration that an administrative measure is inoperative.

The expression "law" used in the Charter (in French, "règle de droit") has not been interpreted by the courts, or commented on by any legal writer, in relation to a guideline. The only related case is McCutcheon v. City of Toronto,<sup>157</sup> which held that municipal by-laws are subject to the Charter. In Blaikie v. AG Quebec (No 2),<sup>158</sup> the Supreme Court extended the obligation to enact legislation in both official languages to Regulations adopted or ratified by the government, on the basis that delegated legislation is of the same importance as the statute itself. Dussault interprets this decision as meaning that the court found the legal effects of a regulation to be similar to those of a statute:

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157. (1983), 147 DLR (3d), p. 193, 41 OR (2d), p. 652.

158. [1981] SCR, p. 312.



En plaçant ainsi le règlement sur le même plan que la loi, à des fins d'interprétation, les tribunaux ont simplement reconnu que ces deux textes pouvaient jouer le même rôle face aux citoyens et que, par le fait même, ils devaient être soumis à des exigences du même ordre, en cas de silence du législateur. En identifiant loi et règlement, ils ont reconnu la similitude de leur effet juridique, non pas de leur nature.<sup>159</sup>

If this analysis is correct, we believe that if we take the expression "law" in its widest sense, guidelines can be treated like Regulations, which they resemble in their legal effect if not in form. In our opinion, however, whether or not they are "laws," guidelines are subject to the supremacy of section 23 and do not fulfil the obligation imposed by that section on the provincial legislatures to enact legislation. As a result, the inclusion of guidelines in the concept of "law" in the Constitution Act, 1982, has no practical effect at all: the school authorities will in any event have to comply with section 23, to which they are subject by virtue of sections 32 and 34, and which itself produces legal effects. The only real point of this discussion is to find an effective legal means of complying with the legislature's corresponding obligation to implement the rights guaranteed in section 23 through imposing truly mandatory provisions. In our opinion, merely adopting guidelines is not adequate. Ministerial directives are subject to the Charter, whatever their legal status - be they administrative acts or quasi-regulatory instruments - but the obligation to enact legislation is properly imposed by section 23 on the legislature itself. It may delegate certain powers of implementation, which may then be exercised by issuing guidelines, a procedure that the Supreme Court considers to be a valid exercise of a discretionary power.<sup>160</sup> However, the legislature may not abdicate its constitutional responsibility to enact valid legislation to implement the constitutional rights of the minority by delegating all its powers to the school boards and providing the minister with the power to control their decisions through guidelines. This method of legislating does not appear to us to comply with the spirit of the Charter.

In several provinces, the school boards have had delegated to them extensive discretionary powers relating to the implementation of section 23.<sup>161</sup> We have established that this procedure appears to us to comply with the Charter. The school board is a decentralized body which is reasonably autonomous, although this

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159. Supra, footnote 136, p. 458.

\* Translation:

By thus putting Regulations on the same footing as statutes for the purposes of interpretation, the courts have simply recognized that both types of instrument can play the same role in their effect on individuals and that as a result they should be subject to the same kind of requirements if the legislature is silent. By identifying Regulations with statutes, they have recognized the similarity of their legal effects, and not of their legal nature.

160. Capital Cities v. CRTC and Maple Lodge Farms Ltd. v. Gouvernement du Canada, supra, footnote 151.

161. Prince Edward Island, Manitoba, Alberta.

feature varies from province to province.<sup>162</sup> As an intermediate level of management, between the administration and the client/parent, the school board's function is essentially one of implementation.<sup>163</sup> In general, its powers are: implementing programs, hiring and assigning personnel, providing related services, managing buildings and facilities, assigning pupils and determining criteria for school admission, selecting sites. With respect to language rights, some of these powers that relate to implementing the Constitution should not, it would seem, fall within the sole discretion of the school boards: decisions concerning site selection, access, financing, programs and other matters affected by section 23 should rather be made on the basis of objective, quantifiable criteria. This does not mean that all responsibility for implementation of section 23 must be withdrawn from the school boards: as well, if we create minority-language school boards, they must have a real right to manage the schools so that ultimately section 23 will be implemented by the minorities themselves. Management implies decision-making, which implies the use of discretion. What is unacceptable is for the school boards to be given unfettered discretionary powers. The role of the school board is to provide for the rights guaranteed by the Charter, the details of which are provided by legislation, and the structure by regulation. A decision to reduce the instruction time in French or to close a French-language school without objective reasons, against the wishes of the parents, would be as open to challenge if it were made by a minority-language school board as if it were made by a majority school board. It is the responsibility of the school board to make objective decisions based on sound reasons in the process of implementing constitutional rights. A minority-language school board composed of members of the minority and empowered to manage the minority-language facilities may have powers identical to those of a majority school board, but it must exercise its powers with the knowledge that it is contributing to the implementation of a constitutional guarantee to which it, as well as the legislature, is subject.<sup>164</sup>

In our opinion, the function of each actor in the process should be as follows. The legislature should create true, objective rights, and not delegate all its responsibilities to lower levels. Regulations should be used to establish and clarify the criteria to guide the authorities who are responsible for compliance with the law. The sub-regulatory authorities - whether minister or school board - should base their decisions on these criteria in order to make the system operational and dynamic. The legislation and Regulations adopted by Saskatchewan are those that come closest to this model.<sup>165</sup> The other provinces might do well to follow that lead.

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162. Gélinas, Les organismes autonomes et centraux de l'administration québécoise, Quebec City, PUL, 1975; A. Lajoie, Les structures administratives régionales, Montreal, PUM, 1968.

163. McKay, W, Education Law in Canada, Toronto, Carswell, 1984; Munroe, D, L'organisation et l'administration de l'éducation au Canada, Information Canada, Ottawa, 1974.

164. P. Foucher, supra, footnote 6; D. Proulx, supra, footnote 41.

165. SS, 1978, c. 17; Reg. 118/79.



## 2) Abolish discretionary powers

In our opinion, a second goal of anyone who is responsible for adapting education legislation to the Charter is to do away with all discretionary powers. We have emphasized the need to abolish discretionary power, but this does not mean that we must do away with all delegation of powers relating to minority-language education rights. It is our opinion that when decisions relating to the very rights guaranteed in section 23 are left to the discretion of school boards or the minister, the Charter is violated. A rigid system, relying on immutable obligations, could not stand up in the face of a changing demographic situation, but a system that allows for too much delegated discretionary power does not ensure adequate compliance with constitutional rights. What must be done is to replace discretionary powers with objective criteria. The law must guarantee real rights. Decisions affecting the exercise of these rights must be based on defined, objective criteria, preferably set out in the legislation or regulations. What these criteria will say may vary, but in general they should serve to direct, structure and guide the exercise of discretion by the administrative authorities.<sup>166</sup> They will also facilitate the exercise of the power of the courts to control and supervise administrative bodies. In developing a set of criteria dealing with the various aspects of implementing section 23 of the Charter the legislature must direct its thoughts to defining the precise result that it wishes to obtain.

## 3) Define rights

One of the major weaknesses of existing education legislation lies in the divergence between the rights guaranteed by the Charter and the rights defined in the legislation. We have commented on a range of ambiguities of this nature, from uncontrolled freedom of choice in language of instruction to immersion and bilingual schools. There was some difference between the constitutional rights that the courts have defined and the concrete results obtained by some French-speaking minorities when they have relied on the provisions of existing education legislation. This legislation does not provide for the full enjoyment by official-language minorities of their constitutional rights. Those rights are not defined in the Charter, and in any event we would not expect to find them there. On the other hand, must we rely solely on the courts to clarify these definitions? In the whole area of the division of jurisdiction, the Supreme Court determined the substance of the expressions used in sections 91 and 92 of the Constitution Act, 1867, and has kept to its practice of giving overly precise definitions.<sup>167</sup> It will undoubtedly take a similar approach to defining a classic fundamental right.<sup>168</sup> If the legislature is concerned about creating a stable legal structure,

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166. This concept of providing a structure for the exercise of discretion was proposed by K.C. Davis in Discretionary Justice, Baton Rouge, Louisiana State University Press, 1969.

167. Tremblay, A, supra, footnote 94, p. 159: "Bref, l'interprétation en est une plutôt dynamique, c'est-à-dire une interprétation qui se fabrique d'une cause à l'autre, la qualification judiciaire des lois lui donnant vie."  
Translation: "In short, it is a dynamic process of interpretation, that is, as process in which the interpretation is developed from one case to the next, as the judicial construction of the legislation breathes life into it."

168. Supra, Section III.

it might better define the substance of the rights guaranteed. Up to now, this function has been performed through guidelines, policy statements and declarations. If the provisions governing the establishment of and access to minority-language schools clearly identify those entitled to the right as well as the nature of the facilities in question, there will be no need for definitions, at least at that level. Those responsible for managing minority-language schools may feel a need for definitions, in order to assist the client parents to understand the institutions their children will be attending, but if the legislation establishes a difference between the eligible population and the facilities, the latter will be defined spontaneously.

The legislation need not define the education project of each minority-language school, but it should be open to an interpretation that would authorize a concrete definition of such a project, in order that minority-language schools and programs may be distinguished easily from those of the majority. Education legislation has not required a definition of denominational schools in order for separate denominational school systems to be established. Similarly, it need not define minority language schools for us to be able to establish a system of such schools. However, this does not mean that we would not encourage the legislatures to include appropriate definitions in any provisions enacted: such definitions would be eminently useful in interpreting and implementing the legislation. Such definitions could be provided in a preamble or the first section, dealing with interpretation. The court would then have an additional standard in applying the education legislation as it was intended by the framers of the Constitution, and in sanctioning any deviations in provincial legislation. We are thinking more specifically here of the definitions in the Charter that do not restrict the concept, such as "instruction in French" or "minority language facility." These definitions would not be sacred, and would have to comply with section 23 as must any other legislative provision, but they would be useful in clarifying in a general way the extent of the rights conferred by the education legislation in question.

We thus believe that if these three general objectives are kept in mind - clarifying the roles and functions of everyone involved, restricting the exercise of discretionary powers and clarifying the definitions of the concepts used in education legislation for implementing the rights guaranteed in section 23 - the provincial legislatures will be assisted in integrating the constitutional guarantees of minority rights into their education legislation, while preserving their margin for manoeuvring as well as their institutional structures. Within these objectives, a combination of various powers will contribute to differentiating the minority-language school systems of one province from those of another, while compliance with these objectives will ensure that those entitled to rights under section 23 will be able to exercise their minimum rights throughout the country, a goal which is one of the fundamental principles of section 23 of the Charter. We tried to limit the objectives of the reform proposed to the basic essence: we did not try to formulate the substance, as that will be the purpose of our next section.



2. Substance of reform measures

In this section we shall provide an indication of what, in our opinion, should be included in a statute or regulation if it is to comply with the Charter.

(i) Statute

The statute should contain the basic principles, along with provisions that clarify the nature of the right to instruction, to educational facilities and to manage those facilities.

In our model, section 1 of the draft legislation contains the definitions:

Draft Education Act:  
Provisions Respecting Rights of Linguistic Minorities

1. In this Act,

- (a) "minority" means the official language minority in a province;
- (b) "member of the minority" means a person who fulfils the conditions set out in section 23 of the Canadian Charter of Rights and Freedoms;
- (c) "minority-language educational facility" means a distinct and separate physical structure, administered by members of the minority, which provides instruction in the language of the minority exclusively, which promotes and strengthens the culture and values of the official language-minority community and which has access to the necessary facilities and personnel for accomplishing these objectives;
- (d) "minority-language management unit" means a distinct administrative unit that is exclusively responsible for managing the minority-language educational facilities under its jurisdiction;
- (e) "school board" means a school board of the official language-majority in the province;
- (f) "minister" means the minister of education in the province;
- (g) "residence" means the ordinary place of residence during more than one-half of the school year;
- (h) "attendance area" means the territory served by a school.

**A. Right to instruction**

We have established that, in our opinion, the minimum number required would be one pupil: the moment a single pupil requests instruction, steps must be taken to fill the request. Rather than opt for complete freedom of choice, the Act should specify that it complies with the Charter. Can conditions be added to the categories defined in the Charter? It is difficult to answer this question, although some conditions relating to homogeneity of the schools might be considered permissible, along with residence requirements. Thus the Act would read:

2. In this Act,

Subject to the admission criteria that may be established by Regulation, any child, one of whose parents fulfils one of the requirements set out in subsections 23(1) and (2) of the Canadian Charter of Rights and Freedoms, is entitled to receive elementary and secondary education in the minority-language wherever in the province such child may reside.

## **B. The right to schools**

The Charter guarantees a right to homogeneous schools, and this is one of the primary purposes of the statute and regulation: to define the conditions for establishing such schools and the conditions on which pupils may attend them. Here is where flexibility and objectivity must go hand in hand. First, there must be the power to create or designate schools; that power must then be delegated; and finally, there must be objective, reasonable conditions for exercising the power. If there are minority-language school boards, they should logically be given the ability to establish schools on their territory, since this is normally a function of a school board. If there is another management structure in place, there should be strict parameters set on the power to establish schools so that the power is not abused. The question of numbers is another complication in the picture; criteria for site selection, establishment and attendance areas must take numbers into account. Thus the Act would read as follows:

3. (1) The right recognized in section 2 shall be exercised in the minority-language educational facility located closest to the pupil's place of residence.
  - (2) If there is no minority-language educational facility located within a reasonable distance from the pupil's place of residence, the minority-language management unit or the minister shall enter into an agreement with the parents
    - (a) to transport the pupil to the closest minority-language educational facility each morning and evening, or
    - (b) to transport the pupil to the minority-language educational facility four times per year and to offer the pupil lodging, if necessary, or
    - (c) to open a class for minority-language instruction in the pupil's territory for a very low number of minority pupils.
  - (3) The agreement referred to in subsection (2) shall comply with criteria that may be established by regulation.
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4. (1) Where there is a minority-language management unit, such unit shall determine, in accordance with criteria that shall be established by regulation, the site of the minority-language educational facility, its attendance area and the grades that will be offered.
  - (2) Where there is no minority-language management unit, the minister shall determine, in accordance with criteria that may be established by regulation, the site of the minority-language educational facility, its attendance area, the grades that will be offered and the minority-language management unit under whose jurisdiction it shall be.

### C. The right to manage

Since flexibility is needed here, we have identified several management models, some of which are appropriate for specific situations in which others would not be. Before proposing how the legislation should provide for this flexibility, we shall summarize briefly:

- status quo: the law applies equally to everyone. This is the situation in Ontario, Nova Scotia and Manitoba, for example. In this system, only those communities that are concentrated in a particular region and constitute the majority of the population there can gain control over a school board. It is possible for members of the linguistic majority in the province (which may be a minority in these regions) to elect representatives to the school board. Similarly, when the provincial linguistic minority is a significant minority of the population in a region, it may control some seats on the school board. In this system, the minority's influence depends solely on demographic forces, and there is no dual system;
- advisory council: used in Alberta, for example, this body amounts at the most to a parents' committee. It is an advisory body, with power only to recommend, and so cannot represent compliance with the requirements of section 23;
- guaranteed proportional representation: proposed in Ontario as a result of the judgment of the Court of Appeal, this structure is based on the concept of minority representation on a school board, such representation to be determined on the basis of average attendance at schools managed by the board. This concept may place Franco-Ontarians who are a majority in a school board but a minority in a region into a minority position on the board;
- minority-language school board: used in New Brunswick, this concept is appropriate for a small regional minority. The minority-language school board has exclusive power to manage the schools of the regional minority. Thus the status of a linguistic group anywhere in the province is of little importance: both anglophones and francophones are guaranteed control over the management of their schools in the regions where they are a minority;
- provincial school board: proposed for Prince Edward Island and Saskatchewan, this concept consists of a single management structure for minority schools. In both these provinces there are few minority-language schools; however, problems may arise in relation to distances;
- dual school map: this system, providing complete separation of the two school systems, is appropriate in provinces where the minority is geographically concentrated. It is in effect in New Brunswick and will soon be in Quebec; it divides the province up on the basis of two school maps, one for each linguistic group. In "bilingual" regions - regions where there is a heavy concentration of the minority group - this system does away with tensions between the two groups by splitting up the school structures. It is supplemented by some dual services within the department of education;



Given the situation in each province, we believe that the following structures would be appropriate:

- Newfoundland, Prince Edward Island: because of the small size of these islands, and the small francophone population, the single school board appears to be appropriate;
- Nova Scotia: geographical concentration of the population in certain areas would permit the creation of Acadian school boards (three or four: Île-Madame, Chéticamp, Baie-Sainte-Marie, Halifax-Dartmouth) with minority-school boards elsewhere;
- Ontario: the geographic distribution of the francophone population makes a dual school map appropriate;
- Manitoba: Franco-Manitobans may clearly have their own school boards in Winnipeg; elsewhere, one or two rural school boards may be appropriate;
- Western provinces and the territories: These five jurisdictions contain scattered minorities, with communities that are small and isolated. A provincial school board may be appropriate, or a school board for each urban region with school boards or proportional representation in rural regions.

It is therefore somewhat difficult to propose a single legislative arrangement. However, in each case, we would propose that there be a body responsible for independently administering the minority-language schools. Whether or not this body is affiliated with the majority-language structure for performing certain common functions, there are certain core questions for which management must be in the hands of the members of the minority. It is this core that we intend to identify, along with a number of objective criteria that are essential for the creation of autonomous management units for minority-language schools.

5. Minority-language educational facilities shall be administered exclusively by the members of the minority, in accordance with the principles established in this Act.
6. (1) When the minister receives a request for the establishment of a minority-language management unit from a group of parents who qualify under section 23 of the Canadian Charter of Rights and Freedoms, he shall establish such a unit by order, and shall designate the territory under the jurisdiction of the unit and the number of members of the unit.  
  
(2) When the minister establishes the territory of a minority-language management unit and the number of its members, he shall do so in accordance with the criteria established by regulation.

- (3) The minister shall appoint the first members of the minority-language management unit, who shall hold office until the next school election in the province.
- (4) If the applicants are already under the jurisdiction of a minority-language management unit, and the criteria established by regulation have not been fulfilled, the minister shall not establish a management unit.
- (5) The decision of the minister may be appealed to the court of superior jurisdiction in the province.

7. (1) Any person

- (a) who is qualified to be a member of a school board in accordance with the provisions of this Act,
- (b) who is qualified by virtue of section 23 of the Canadian Charter of Rights and Freedoms, and
- (c) who has a practical knowledge of the minority language and culture

shall be qualified to be a member of the minority language management unit.

(2) Any person

- (a) who is qualified by virtue of section 23 of the Canadian Charter of Rights and Freedoms,
- (b) who has a practical knowledge of the minority language and culture, and
- (c) who has a child in attendance at a minority language educational facility

shall be qualified to elect a member of a minority-language management unit.

- (3) Members of the minority-language management unit shall be elected in accordance with the procedures for electing the members of a school board in the province.

8. (1) The minority-language management unit shall have exclusive jurisdiction over minority-language educational facilities, identical to the powers conferred by this Act on a school board over majority-language educational facilities; in particular, but not so as to restrict the generality of the foregoing, the minority-language management unit shall:

- (a) select the site of minority-language educational facilities under its jurisdiction and determine their attendance area and the grades that they will offer, subject to the criteria established by Regulation;

- (b) determine the type of educational facilities, including their denominational affiliation;
- (c) establish rules for closing schools under its jurisdiction and procedures for transferring pupils;
- (d) hire teachers, subject to the criteria established by regulation, and direct their assignment in the territory under its jurisdiction;
- (e) provide for the enrolment and admission of pupils;
- (f) establish the educational project of the minority-language school;
- (g) implement programs in the minority-language educational facilities;
- (h) establish, implement and evaluate supplementary programs in minority-language educational facilities;
- (i) hire and assign non-teaching professional personnel;
- (j) administer, maintain, repair and make available the necessary buildings and equipment for provision of instruction in the minority-language;
- (k) manage the budget;
- (l) collect school taxes in accordance with the provisions of this Act;
- (m) organize school transport in accordance with the Regulations;
- (n) hire, establish the duties of and dismiss administrative personnel;
- (o) purchase, rent or otherwise obtain the use of the necessary premises and equipment for performing its duties;
- (p) establish rules for its internal operations.

9. In the performance of its duties, the minority-language management unit shall respect denominational school rights; in particular, and not so as to restrict the generality of the foregoing:

- (1) members of the minority who are members of a class of persons protected by section 93 of the Constitution Act, 1867 shall have the exclusive right to elect trustees, in the same proportion as pupils in attendance at denominational schools to pupils in attendance at non-denominational schools under the jurisdiction of the minority-language management unit;
- (2) the trustees shall have the exclusive right to manage denominational schools, and with respect to such schools shall have the following powers:

(a) selection of teachers, assignment of teachers to denominational schools, certification of teachers and establishment of conditions of employment respecting denominational affiliation, in addition to the conditions prescribed by Regulation,

(b) admission of pupils to denominational schools and establishment of conditions of admission respecting denominational affiliation, in addition to the conditions prescribed by Regulation, and

(c) establishment of the denominational educational project and of programs relating to the denominational nature of the schools;

(3) other matters within the jurisdiction of the minority-language management unit shall be managed jointly by the trustees and the other members of the minority-language management unit;

(4) Any person

(a) who is qualified by virtue of subsection 7(1) of this Act, and

(b) who is identified as a denominational school supporter when he or she is nominated

is qualified to be minority trustee;

(5) Any person

(a) who is qualified by virtue of subsection 7(2) of this Act, and

(b) who is identified as a denominational school supporter when the voters' list is prepared

is qualified to vote in an election of minority trustees;

(6) Minority trustees shall be elected at the same time and in the same manner as other members of the minority-language management unit.

10. Financing for minority-language educational facilities shall be provided in accordance with the normal procedures established in this Act, in the Regulations and in the budget rules, subject to the following conditions:

(a) minority-language educational facilities shall receive a share of public funds in proportion to their needs, and

(b) minority-language educational facilities shall not be penalized because they have lower registration than the provincial average.

While this list is a little long, it summarizes the main elements of management. Section 5 establishes the principle of the right to manage as guaranteed by the Charter; section 6 offers the minister the flexibility needed to adapt the structure to provincial realities, while denying him or her any arbitrary discretion in this respect; section 7 ensures that school administrators are representative; section 8 defines the minimum substance of



the right to manage; and section 9 defines the substance of the right to manage as it relates to denominational schools. Thus our objectives - clarity and flexibility - are met. Of course, this structure is merely an outline, but it does illustrate one way in which legislation can comply with section 23 of the Charter while still reserving the powers needed by the school authorities.

If we are to provide a comprehensive proposal, we must include an enabling provision, granting power to the Lieutenant-Governor-in-Council to make regulations.

11. The Lieutenant-Governor-in-Council shall make regulations:

- (a) establishing the criteria for the opening of a minority-language educational facility, and the grades to be offered;
- (b) establishing the criteria for determining the attendance area of a minority-language educational facility;
- (c) establishing criteria for the selection of a site for a minority-language educational facility;
- (d) establishing criteria for the transport of pupils to minority-language educational facilities;
- (e) establishing criteria for the admission of pupils to minority-language educational facilities;
- (f) establishing criteria for establishing a minority-language management unit, the territory under its jurisdiction and the number of members of the unit;
- (g) establishing criteria for hiring teaching personnel;
- (h) establishing an arbitration board and the powers, composition, mandate and procedures for such board.

(ii) The Regulations

We have designed the Regulations to be a flexible tool for identifying the parameters within which the powers conferred by the Act are to be exercised. Of course, these criteria could have been included in the Act itself, but we preferred to leave them in the form of Regulations since they relate less to the substance of the right than to the manner in which it will be implemented. The essential function of our Regulation therefore lies in the establishment of criteria and procedures for putting education rights into operation. We have divided this function into three aspects: the question of facilities, the question of admission and hiring criteria and the question of the management unit. The criteria that we have identified are based on provisions that we studied during the course of this work; undoubtedly during the development of an official regulation there would have to be consultation with the individuals and groups involved.

It will have been noted that these provisions are intended to supplement the Act, remaining somewhat imprecise because of their generality. The powers delegated under the Act are made subject to mandatory criteria, which must be reviewed objectively and considered by the courts. The obligation to enact legislation has been fulfilled, there are no more absolute discretionary powers, but there is still some flexibility. The procedures set out will still permit schools to be opened and closed and pupils to be transferred, but they impose duties relating to establishing minority-language school boards, and the powers of those boards.

The text of the Regulations appear in the appendix.

### 3. The reform process

Here,<sup>169</sup> as elsewhere,<sup>170</sup> we have stated that what is needed is political agreement to provide for practical implementation of section 23 of the Charter.<sup>171</sup> It must be recalled that the removal of the education rights question to the courts has serious consequences for minority-language communities. Apart from the high costs of such proceedings, there may be significant backflash effects. Parents, who are the people entitled to the guaranteed rights, may hesitate to embark on these adventures, since litigation can drain much energy that could better be used for other purposes, often divide the community internally, give rise to hostile reactions in some quarters of the majority-language community and block dialogue with government authorities. Viewed with these risks, the benefits to be gained from litigation at this stage of the struggle may be offset by the disadvantages. Minority groups are quite concerned about the negative effects that a judgment against them would have in their fight for their cause. The legal community still cannot give a clear statement of the substance of section 23 - as this study has clearly indicated - and the answer that they can give to the pressing questions of minority groups depends greatly on the aspect of the Charter they choose to emphasize. Those who prefer the reform aspect of section 23 will take an approach that is most favorable to minority groups, as we have done. On the other hand, there are others, including the legal advisers of some provincial governments,<sup>172</sup> who highlight the "numbers warrant" and "reasonable limits" tests, and argue that some aspects of the status quo need improvement but no more than that. The courts themselves have only limited experience with this kind of case.<sup>173</sup> Lawyers must become familiar with the extrinsic evidence. And we must not be too surprised that it has taken three years before parents' groups have decided to take the schools issue to the courts.

169. Supra, Part 3.

170. Droits scolaires: la responsabilité des parents, speech made at the annual meeting of the Fédération provinciale des comités de parents, Winnipeg, March 9, 1985; De la religion à la langue: la protection constitutionnelle des droits scolaires au Manitoba, speech made at the annual meeting of the Association des commissaires d'école franco-manitobaine, Portage la Prairie, February 2, 1985; L'article 23 de la Charte et les droits scolaires des franco-ontariens, speech made at the annual meeting of Franco-Ontarians, Télé-Clef 1984, no. 3, p. 8.

171. Professor Magnet is eloquent on this point: supra, footnote 4.

172. Memorandum of the Attorney-General of Alberta in Bugnet, supra.

173. Supra, section III.

The option of political action, given the situation minority groups now find themselves in, does not appear any more likely to produce successful results. The political crisis in Manitoba, the tense hearings of a committee of the Government of New Brunswick, the tensions in Montreal surrounding the closing of English-language schools and the transfer of the schools to francophones - all these are merely the most visible indications of a malaise that comes over an entire people when the language question is brought up. In education, minority rights is the desire to perpetuate, affirm and validate its differences. Throughout our work on this study, this desire has been expressed to us by the representatives of minority-language groups whom we met informally. Minority groups do not have the political clout to attain their objectives by negotiation alone, and so they believe it is important to take the education rights question in their provinces to the courts.<sup>174</sup> Unless there is substantial progress in political negotiations, we believe that we must expect new court challenges.

However, we consider it important not to abandon preparation of a political struggle, and believe that such preparation must begin by having all those in a province involved in the struggle join their efforts. This process has already been begun in some provinces: the minority groups know what they want. But in others, the community is itself divided. Permanent mechanisms for co-operation will have to bring about a resolution of these problems, so that the bargaining position of the minority group is not weakened.

But consensus, like progress, takes time, and galloping assimilation continues to ravage the ranks of some minority-language groups, so that the merits of these long and expensive battles begin to seem doubtful. A provincial education system cannot, of course, be reformed overnight, but nor do we have the luxury of waiting until there is no one left in the minority-community to take action. This was not the intent of the framers of the Constitution, who rather gave official recognition to both languages in the hope of preserving two groups in the country who would keep the languages alive. We should see here only an opportunity to move forward, not to increase the tensions that are typical of the political debate. One judgment is available to us as a cornerstone: the decision of the Court of Appeal of Ontario, which provides us with a clearer theory of the substance of section 23. Without actually advising that we take to the courts at any cost, we believe that it is important for the future development of the law as well as for enforcement of their rights that those who have been given such rights by section 23 be made aware of the urgency of asserting them, before the courts if need be. We should also encourage them to pursue their thinking for the post-judgment era, so that they will be able to propose original courses of action to their legislatures for compliance with the law.

This study is intended as a first step along this path. The ideas we have put forward are a catalyst for a more thorough consideration of the problems, involving the community, school administrators and government representatives. There should be working groups formed, and these groups should come forward with concrete proposals. It seems that the judgments of the courts will likely clarify the law, but without establishing the means of implementing it. Of necessity, if our analysis of section 23 of the Charter is confirmed by the courts, we will have to

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<sup>174</sup>. In the opinion of Professor Proulx, the legitimacy of legal action lies precisely in its effect as a counterbalance to weakness in the political arena: supra, footnote 41, p. 369.



take stock of all minority-language schools and the places where they exist in relatively homogeneous groupings, identify their needs, if necessary bring back their potential pupils who are now in immersion classes, allocate property, assets and debts, and personnel, in some cases reorganize the departments of education, establish a transitional system. The details of these questions will not be settled by legislation, but at the administrative level. People who are entitled to this right must not only be called upon to take part in these operations, but in our opinion their opinion must be given considerable weight. The Charter gives these rights to parents, and these parents must take on responsibility for enforcing their rights.

Financial assistance must be provided to them so that they can perform their part without hardship, if we are to attain our objectives. The federal government's legal challenge program will play an important role in purely legal cases, but financial assistance from both the provincial and the federal government is also required if they are to make a significant contribution to developing the approaches that will affect them most directly. It was not within our mandate to give an opinion on the effectiveness of programs of assistance to official language-minority groups. However, we would state our sincere wish that such programs continue in one way or another to stimulate effective participation by minority-language groups in developing these concrete approaches. We should undertake and expand our work on conferences, working groups, inter-provincial co-operation, court references for clarification and supplementary research, without losing time or our sense of urgency.<sup>175</sup> Now that we have section 23, we can no longer put the problem off: the provinces will have to face their constitutional responsibilities in a more appropriate manner than they have done to date.

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175. Rapport du Commissaire aux langues officielles, 1984.





## **Appendices**



**ANNEXE I: Description Générale du Système par Province**  
**APPENDIX I: General Description of the System by Province**

**Province:** Terre-Neuve  
Newfoundland

- |  |                                    |
|--|------------------------------------|
| 1) Population francophone ° French population:   | 0.5%                               |
| 2) Concentration territoriale ° Territorial concentration:<br>Labrador City, Port au Port, Avalon, Grande Terre,<br>Stephenville, St. John's   |                                    |
| 3) Population scolaire francophone ° French school population:   | 100 French<br>Immersion: 4 schools |
| 4) Écoles francophones homogènes ° French schools:   | 1 - Labrador City                  |
| 5) Conseils scolaires dispensant l'enseignement en français °<br>School Boards offering French language of instruction:  | 2                                  |
| 6) Libre choix de la langue d'enseignement ° Freedom of choice<br>of language of instruction:  | Oui<br>Yes                         |
| 7) Conseils scolaires francophones ° French school boards:   | Aucun<br>None                      |
| 8) Nombre minimal requis pour classe française ° Minimal<br>number warranted for opening of a class:   | Discrétionnaire<br>Discretionary   |
| 9) Transports des francophones d'une division scolaire à une<br>autre aux frais de la division de résidence °<br>Transportation of francophones from one school division to<br>another with the first division paying costs: | N/A                                |
| 10) Pouvoir discrétionnaire de la commission scolaire ou du<br>ministre pour ouvrir une classe ° Discretionary power of<br>school board or minister to open a class:   | Oui<br>Yes                         |
| 11) Pouvoir discrétionnaire de la commission scolaire ou du<br>ministre pour ouvrir une école ou la fermer ° Discretionary<br>power of School Board or Minister to open a school or close<br>it:                             | Oui<br>Yes                         |



DESCRIPTION GÉNÉRALE DU SYSTÈME  
GENERAL DESCRIPTION OF THE SYSTEM

LOI, RÈGLEMENT DIRECTIVE

: RSN 1970, C-346

ACT, REGULATION, DIRECTIVE

PROCESSUS

La loi est silencieuse. Seule les écoles de Labrador City et de Grande Terre fonctionnent en français, utilisant des programmes du Québec.

Les autres francophones se contentent de cours d'immersion.

RÉFORMES À VENIR

Avoir l'instruction en français dans la région acadienne.

PROCESS

The act is silent. Only Labrador City and Grande Terre offer French instruction. Other francophones go to immersion.

REFORMS TO COME

To implement French instruction in the Acadian region.

**Province: Île-du-Prince-Edouard**  
Prince Edward Island

- 1) Population francophone ° French population: 5%
- 2) Concentration territoriale ° Territorial concentration:  
Miscouche et l'ouest ° Miscouche and the west
- 3) Population scolaire francophone ° French school population: 2%
- 4) Écoles francophones homogènes ° French schools: 1 élémentaire (1-9) et  
1 combiné (1-12)  
1 elementary (1-9)  
and one combined  
(1-12)
- 5) Conseils scolaires dispensant l'enseignement en français °  
School boards offering French language of instruction: 2
- 6) Libre choix de la langue d'enseignement ° Freedom of choice  
of language of instruction: Oui  
Yes
- 7) Conseils scolaires francophones ° French school boards: Évangéline no 5
- 8) Nombre minimal requis pour instruction en français ° Minimal  
number warranted for French instruction: 1-9 : 25 sur 3 niveaux  
1-9 : 25 on 3 grades  
10-12: discrétionnaire  
10-12: discretionary
- 9) Transport des francophones d'une division scolaire à une  
autre aux frais de la division de résidence ° Transportation  
of francophones from one school division to another with the  
first division paying costs: Oui si le nombre  
requis ne peut être  
rassemblé.  
Yes if the numbers  
required may not be  
assembled.
- 10) Pouvoir discrétionnaire de la commission scolaire ou du  
ministre pour ouvrir une classe ° Discretionary power of  
school board or minister to open a class: Oui - Commission scolaire  
Yes - School board
- 11) Pouvoir discrétionnaire de la commission scolaire ou du  
ministre pour ouvrir une école ou la fermer ° Discretionary  
power of school board or minister to open a school or close  
it: Oui  
yes

DESCRIPTION GÉNÉRALE DU SYSTÈME  
GENERAL DESCRIPTION OF THE SYSTEM

**LOI, RÈGLEMENT, DIRECTIVE** Règlement sur l'enseignement dans la langue de la minorité.  
: 1980, 29 ELII, c. 48; RSPEI, 1974, c. S-2, part VI.  
**ACT, REGULATION, DIRECTIVE** Regulation respecting minority-language education.

**PROCESSUS**

Le conseil scolaire doit ouvrir une classe élémentaire dans la langue de la minorité des élèves de son district, si selon lui 25 élèves sur trois niveaux peuvent être réunis. La langue des districts scolaires est celle de la majorité de la population. Si le nombre est inférieur au nombre requis ou ne peut être réuni, le conseil scolaire doit offrir à ces élèves l'immersion française ou le transport vers une école offrant le programme en français. La langue considérée est celle de l'élève et non du parent.

Au niveau secondaire, le conseil scolaire s'exécute si un nombre suffisant d'élèves le demande et peut être réuni. Sinon, il fournit le transport.

Le temps d'enseignement en français est de 100% aux niveaux de 1<sup>re</sup>-3<sup>e</sup>, de 80% en 3<sup>e</sup>-6<sup>e</sup>, de 70% en 7<sup>e</sup>-13<sup>e</sup>.

La loi sera amendée pour que le critère de "langue maternelle" se conforme à l'article 23 de la Charte.

**RÉFORMES À VENIR**

Une référence à la Cour d'appel de l'Île concernant le nombre, les pouvoirs discrétionnaires des conseils scolaires, un centre scolaire et culturel à Charlottetown et la gestion.

**PROCESS**

The school board must open a class for grades 1-9 if 25 children of the language of the minority of the district can be assembled in three consecutive levels. The language of a district is that of the majority in the population. If the number is less, or cannot be assembled, the school board must offer immersion or transportation. The language considered is that of the child, not of the parent.

For grades 10-12, the school board must offer classes if a sufficient number of students ask it and can be assembled. Otherwise, transportation must be provided.

Time of instruction in French is 100% in grades 1-3, 80% in 3-6, 70% in 7-13.

The Act will be amended to have the "mother tongue" criterion corrected in conformity with s. 23 of the Charter.

**REFORMS TO COME**

Reference to the Court of Appeal concerning numbers, discretionary powers of school boards; a cultural and school centre in Charlottetown.

**Province:** Nouvelle-Écosse  
Nova Scotia

- |   |   |
|---|---|
| 1) Population francophone ° French population:  | 4.3%  |
| 2) Concentration territoriale ° Territorial concentration:<br>Clare, Argyle, Inverness, Richmond, Halifax   |   |
| 3) Population scolaire francophone ° French school population:  | 2.9%  |
| 4) Écoles francophones homogènes ° French schools:<br>Secondaire : 10/107 - 9.3%<br>High Schools                                      Total 21/374 - 5.6%   | 16 homogènes,<br>16 homogenous<br>7 mixtes - 7 mixed  |
| 5) Conseils scolaires dispensant l'enseignement en français °<br>School boards offering French language of instruction:   | 5/22 - 22.7%  |
| 6) Libre choix de la langue d'enseignement ° Freedom of choice<br>of language of instruction:   | Oui, mais contrôlé<br>Yes, but controlled   |
| 7) Conseils scolaires francophones ° French school boards:  | 1   |
| 8) Nombre minimal requis pour classe française ° Minimal<br>number warranted for opening of a class:  | Non précisé<br>Not specified  |
| 9) Transport des francophones d'une division scolaire à une<br>autre aux frais de la division de résidence ° Transportation<br>of francophones from one school division to another with the<br>first division paying costs: | Non obligatoire<br>Not compulsory   |
| 10) Pouvoir discrétionnaire de la commission scolaire ou du<br>ministre pour ouvrir une classe ° Discretionary power of<br>school board or minister to open a class:  | Oui - Commission scolaire<br>Yes - School board   |
| 11) Pouvoir discrétionnaire de la commission scolaire ou du<br>ministre pour ouvrir une école ou la fermer ° Discretionary<br>power of school board or minister to open a school or close<br>it:                            | Oui - Désignation d'école<br>acadienne par<br>ministre<br>Yes - Designation of<br>Acadian school by<br>minister |



DESCRIPTION GÉNÉRALE DU SYSTÈME  
GENERAL DESCRIPTION OF THE SYSTEM

LOI, RÈGLEMENT, DIRECTIVE

Directive du ministre de l'Éducation aux conseils scolaires, automne 1984.

: NSS, 1981, c. 20; Education Act, s. 3(aa), 4 (ka), 5A.

ACT, REGULATION, DIRECTIVE

Directive sent to school boards by the minister of education, autumn 1984.

PROCESSUS

Sur demande d'un ou plusieurs conseils scolaires, le ministre recommande au cabinet de désigner une école acadienne, d'établir le territoire qu'elle dessert et de désigner le programme.

L'instruction en français est à 100% au primaire, à 70% en secondaire I, II, et III, et à 60% au secondaire IV et V.

RÉFORMES À VENIR

Aucune au plan légal. Des revendications sont attendues pour l'immersion française, les transferts d'élèves, la gestion scolaire, l'accès gratuit aux écoles des bases militaires.

PROCESS

On the request of one or more school boards, the minister recommends to the cabinet the designation of a school as an Acadian school, and the proclamation establishes the territory served by the school and the program of studies.

The policy guidelines stipulate that the French language is used 100% of the instructional time at the elementary level, save for the English language course, 70% of the time in the first three grades of High school and 60% for the two last grades of high school.

REFORMS TO COME

None from a legal standpoint. Problems are expected for French immersion, transfer of students, and school administration, and free access to schools on military bases.

**Province:** Nouveau-Brunswick  
New Brunswick

- 1) Population francophone ° French population: 33.6%
- 2) Concentration territoriale ° Territorial concentration:  
Nord-ouest, nord-est, sud-est. Quelques concentrations à  
Saint John et Fredericton. North-west, north-east,  
south-east. Some francophones in Fredericton and Saint John.
- 3) Population scolaire francophone ° French school population: 32.5%
- 4) Écoles francophones homogènes ° French schools: 156/450 - 34.6%
- 5) Conseils scolaires dispensant l'enseignement en français °  
School boards offering French language of instruction: 18/41 - 43.9%
- 6) Libre choix de la langue d'enseignement ° Freedom of choice  
of language of instruction: Oui, mais contrôlé  
Yes, but controlled
- 7) Conseils scolaires francophones ° French school boards: 15/41 - 36.5%  
3 conseils scolaires  
minoritaires  
3 Minority school  
boards
- 8) Nombre minimal requis pour instruction en français ° Minimal  
number warranted for French instruction: 1
- 9) Transport des francophones d'une division scolaire à une  
autre aux frais de la division de résidence ° Transportation  
of francophones from one school division to another with the  
first division paying costs: Oui, lorsque  
nécessaire  
Yes, when necessary
- 10) Pouvoir discrétionnaire de la commission scolaire ou du  
ministre pour ouvrir une classe ° Discretionary power of  
school board or minister to open a class: Oui, mais selon nombre  
et concentration  
territoriale  
Yes, but considering  
number and  
territorial  
concentration
- 11) Pouvoir discrétionnaire de la commission scolaire ou du  
ministre pour ouvrir une école ou la fermer ° Discretionary  
power of school board or minister to open a school or close  
it: Oui, mais selon nombre  
et concentration  
territoriale  
Yes, but considering  
numbers and  
territorial  
concentration

DESCRIPTION GÉNÉRALE DU SYSTÈME  
GENERAL DESCRIPTION OF THE SYSTEM

LOI, RÈGLEMENT, DIRECTIVE	Loi scolaire, RSNB, 1973, c. S-5, ss. 3.1 - 3.3, 18.1; règlement. 81-156, a. 3.
:	Loi sur les langues officielles, RSNB, 1973, c. 0-1, a. 12. <u>SANB c. Minority Language SB No. 50 (1983)</u> ; 48 NBR (2d), en appel.
ACT, REGULATION, DIRECTIVE	<u>School Act</u> , RSNB, 1973, c. S-5, ss. 3.1 - 3.3, 18.1; Regulation 81-156, s. 3. <u>Official Language Act</u> , RSNB, 1973, c. 0-1, s. 12. <u>SANB v. Minority Language SB No. 50 (1983)</u> , 48 NBR (2d), on appeal.

PROCESSUS

Les classes, les cours et les écoles d'un district sont organisés sur la base de la langue de la majorité du district. Le libre choix de la langue d'enseignement existerait, mais conditionné par la capacité linguistique des élèves de suivre les cours. Si 30 parents le demandent, un conseil scolaire minoritaire peut être établi.

Un conseil scolaire peut dispenser l'enseignement à sa minorité de l'autre langue officielle.

En certains endroits, la carte scolaire est superposée.

RÉFORMES À VENIR

Clarifier le libre choix et le statut des francophones à l'immersion française.

Il y a des pressions pour la dualité complète au ministère.

PROCESS

Classes, programs and schools of a district are organized on the basis of the language of the majority. Freedom of choice of the language of instruction exists but is limited by the linguistic capacity of the student. If 30 parents request it, a minority language school board may be set up.

A school board may arrange classes for its minority.

In some areas, the school map is superimposed.

REFORMS TO COME

Clarify the freedom of choice and the status of francophones in French immersion

There are pressures for complete duality in department.

Province: Québec

- 1) % Population anglophone ° Anglophone population 11%
  
- 2) Concentration territoriale ° Territorial concentration:  
Montréal (ouest), Cantons de l'Est, Outaouais ° Montreal  
(west), Eastern Townships, Outaouais
  
- 3) Population scolaire anglophone ° English school  
population: 13%
  
- 4) Écoles anglophones homogènes ° Anglophone schools:
 

élémentaires	239	elementary
secondaires	106	secondary
combinés	85	combined
total	430	total
  
- 5) Conseils scolaires dispensant l'enseignement en anglais °  
School boards offering English language instruction:
 

locaux:	10	homogènes
	38	mixtes
régionaux:	4	homogènes
	14	mixtes
intégrés:	4	homogènes
	23	mixtes
local:	10	homogeneous
	38	mixed
regional:	4	homogeneous
	14	mixed
integrated:	4	homogeneous
	23	mixed
  
- 6) Libre choix de la langue d'enseignement °  
Freedom of choice of language of instruction:
 

Accès restreint à
l'enseignement en
anglais
Restricted access to
English-language
instruction
  
- 7) Conseils scolaires anglophones ° English  
school boards: ?
  
- 8) Nombre minimal requis pour instruction en anglais °  
Minimal number warranted for English instruction: Un  
One
  
- 9) Transport des anglophones d'une division  
scolaire à une autre aux frais de la division  
de résidence ° Transportation of anglophones  
from one school division to another with the  
first division paying costs:
 

Oui, si l'enfant est
admissible à
l'enseignement
en anglais.
Yes, if the child is
eligible for
English-language
instruction.



- 10) Pouvoir discrétionnaire de la commission scolaire  
ou du ministre pour ouvrir une classe °  
Discretionary power of school board or minister to  
open a class:

Oui - Commission scolaire; mais l'autorisation ministérielle est requise pour l'enseignement en anglais.  
Yes - School board; but authorization of minister is required for English-language instruction.

- 11) Pouvoir discrétionnaire de la commission scolaire  
ou du ministre pour ouvrir une école ou la fermer  
° Discretionary power of school board or minister  
to open a school or close it:

Oui - Commission scolaire. Les plans et devis d'une construction sont approuvés par le ministre (a. 235 LIP). Le comité d'école est consulté pour la fermeture définitive de l'école.  
Yes - school board. Plans and specifications for construction are approved by the minister (s. 235 Ed. Act). The school committee is consulted for final closing of the school.

DESCRIPTION GÉNÉRALE DU SYSTÈME  
GENERAL DESCRIPTION OF THE SYSTEM

<b>LOI, RÈGLEMENT, DIRECTIVE</b>	Loi sur l'instruction publique, 1977, LRQ, c. i-14. Charte de la langue française, 1977, LRQ, c. C-11 a.73.
	: Loi sur la réforme scolaire - Loi 3, 1985.
<b>ACT, REGULATION, DIRECTIVE</b>	Education Act, RSQ, 1977, c. I-14. Charter of the French Language, 1977 RSQ, c. C-11, s. 73. Act respecting Public Elementary and Secondary Education, Bill 3, 1985.

## PROCESSUS

Jusqu'à 1984, l'accès à l'enseignement en anglais était limité par l'article 73 de la Charte de la langue française, aux enfants de parents qui le demandaient et qui remplissaient les conditions suivantes:

- instruction élémentaire en anglais (majeure partie) au Québec (clause Québec)
  - domicile au Québec à la date d'entrée en vigueur de la Loi 101 et instruction élémentaire en anglais (majeure partie) hors du Québec
  - enfant recevait légalement son instruction en anglais au Québec à la date d'entrée en vigueur de la Loi, ou un frère ou une soeur si l'aîné était dans la situation précédente
  - accord de réciprocité
  - séjour temporaire
- } exemption de la règle d'admissibilité

Depuis le jugement de la Cour suprême sur la Loi 101, les catégories de l'article 23 de la Charte semblent prépondérantes.

L'accès est garanti à tout enfant qui remplit ces conditions.

La gestion est confessionnelle de sorte que les secteurs catholiques et protestants comptent chacun des écoles françaises et des écoles anglaises.

### RÉFORMES À VENIR:

La Loi 3 confie au ministre la tâche de redessiner les cartes scolaires sur une base linguistique. L'élection des nouveaux

## PROCESS

Until 1984, access to English schools was limited by section 73 of the Charter of French language to children of parents who asked it and who met the following requirements:

- primary instruction in French
  - parents domiciled in Quebec at the time of the coming into force of Bill 101 and who received elementary instruction in English outside Quebec
  - one child was legally receiving instruction in English in Quebec at the date of coming into force of Bill 101, or one brother or sister
  - Provinces with reciprocity agreement
  - Temporary stay
- exemption from  
the eligibility  
rule

After the Supreme Court judgment, the categories of section 23 of the Charter are to be applied.

Access is guaranteed to every child meeting those conditons.

Administration is religious, not linguistic. Catholic and Protestant school boards can have French or English schools.

## REFORMS TO COME

Bill 3 asks the minister to redraw school maps on a linguistic basis. Elections of new school commissioners

commissaires aura lieu en décembre 1985 pour les commissions dont les frontières sont modifiées. Un comité provisoire d'implantation doit évaluer le nombre et le statut des écoles. Toute la réforme doit être complétée en juillet 1986.

Les commissaires confessionnels contestent la légalité de cette réforme.

will be held in December 1985 for school boards where boundaries do not correspond to existing ones. An implementation committee has the task of evaluating number and status of schools. The reform should be completed by 1986 but denominational school boards challenge its legality.

Denominational school trustees are challenging the validity of this reform.

**Province: Ontario**

- 1) Population francophone ° French population: 5.5%
  
- 2) Concentration territoriale ° Territorial concentration: Nord et est ° North and east. Groupe important à Toronto, quelques groupes au sud-ouest ° Important group in Metro Toronto, some groups in south-west
  
- 3) Population scolaire francophone ° French school population: 5.2%
  
- 4) Écoles anglophones homogènes ° French schools:
 

Primaires 263/3816 Elementary homogènes 6.89% homogeneous  
 hétérogènes ° mixed  
 Secondaires 31/631 Secondary homogènes 5.23% homogeneous  
 hétérogènes ° mixed  
 T. 342/4447 - 7.69%
  
- 5) Conseils scolaires dispensant l'enseignement en français ° School boards offering French language of instruction: 96/181 - 44%
  
- 6) Libre choix de la langue d'enseignement ° Freedom of choice of language of instruction:
 

Oui, pour les francophones.  
 Yes, for the francophones.
  
- 7) Conseils scolaires francophones ° French school boards:
 

Aucun  
 Note: Bill 160 assurerait représentation garantie  
 None  
 Note: Bill 160 would ensure representation is guaranteed.
  
- 8) Nombre minimal requis pour classe française ° Minimal number warranted for opening of a class:
 

Un  
 One



- |  |   |
|--|---|
| 9) Transport des francophones d'une division scolaire à une autre aux frais de la division de résidence ° Transportation of francophones from one school division to another with the first division paying costs: | Oui<br>Yes  |
| 10) Pouvoir discrétionnaire de la commission scolaire ou du ministre pour ouvrir une classe ° Discretionary power of school board or minister to open a class:   | Oui, mais selon le nombre et les circonstances<br>Yes, but with regard to numbers and circumstances |
| 11) Pouvoir discrétionnaire de la commission scolaire ou du ministre pour ouvrir une école ou la fermer ° Discretionary power of school board or minister to open a school or close it:                            | Oui<br>Yes  |

**DESCRIPTION GÉNÉRALE DU SYSTÈME**  
**GENERAL DESCRIPTION OF THE SYSTEM**

**LOI, RÈGLEMENT, DIRECTIVE** Education Act, RSO, 1980 c. 129, pt XI.  
: Act to amend the School Act, June 1984.  
**ACT, REGULATION, DIRECTIVE** Re Minority-Language Education Rights,  
1984, 10 DLR (4d), p. 491.

**PROCESSUS**

L'enseignement est organisé sur la base des modules scolaires de langue française. Si le conseil scolaire ne peut offrir un MSLF, il doit l'acheter du plus proche conseil qui l'offre, et défrayer le transport et la résidence au besoin. L'accès aux écoles est conditionné par l'art. 23 de la Charte, un comité d'admission peut accepter des élèves non francophones. Les classes et les cours sont homogènes. Les écoles le sont dans la mesure du possible.

Des comités consultatifs conseillent le conseil scolaire sur l'administration du programme.

Les anglophones minoritaires d'un conseil scolaire ont les mêmes droits que les francophones minoritaires.

**RÉFORMES À VENIR**

Projet de loi 160 - ou équivalent

Sections françaises dans les conseils scolaires si les élèves francophones  
1) sont minoritaires au sein du CS  
2) sont 500 ou 10% de la population scolaire du CS. La section compte de trois à sept conseillers. Le parent choisit la section où il vote. Les fonds sont répartis au prorata de la fréquentation après paiement des dépenses communes.

Les anglophones minoritaires ont les mêmes droits.

**PROCESS**

Instruction is organized on the basis of the French Language Instructional Units. If a School Board cannot offer a FLIU, it must purchase it from the nearest school board offering one and provide transportation and boarding. Access to schools is restricted to children and parents qualifying under 23, but an admission committee may admit non French students. Classes and courses are in one language. Schools are homogenous as far as possible.

Advisory committees help the school board to manage FLIU.

Anglophones who are in minority in a school board have the same rights as francophones in the same position.

**REFORMS TO COME**

Bill 160 - or equivalent

French sections in School Boards where french pupils  
1) are in minority in the S.B.  
2) are 500 or 10% of the student population. The section has 3 to 7 councillors. Parents select the section where they vote. Funds are allocated on pro-rata of average daily inscription, after paying common expenses.

Anglophones in minority have the same rights.

Province: Manitoba

- 1) Population francophone ° French population: 5.1%
- 2) Concentration territoriale ° Territorial concentration: Winnipeg, St. Boniface, sud de la province ° Southern part of province:
- 3) Population scolaire francophone ° French school population: 3.2%
- 4) Écoles francophones homogènes ° French schools:  
Élémentaires: homogènes 9/484 - 1.8%.  
hétérogènes 32/484 - 6.6%  
Combinées: hétérogènes 4/151 - 2.6% Total 62/784 - 7.9%  
Secondaires: homogènes 5/149 - 3.36%  
hétérogènes 12/149 - 8.5%
- 5) Conseils scolaires dispensant l'enseignement en français ° School boards offering French as a language of instruction: 21/48 - 43.7%
- 6) Libre choix de la langue d'enseignement ° Freedom of choice of language of instruction: Oui  
Yes
- 7) Conseils scolaires desservant un nombre significatif de Franco-Manitobains ° School boards serving a significant number of Franco-Manitobans: 5
- 8) Nombre minimal requis pour classe française ° Minimal number warranted for opening of a class: 23/class
- 9) Transport ou allocation pour le transport obligatoire. Le montant de l'allocation est optionnel ° Transportation of francophones or allowance for transport is mandatory. The amount of the allowance is optional: Optionnel, sur décision du ministre  
Optional, on decision of the minister
- 10) À moins de 23 élèves, pouvoir discrétionnaire de la commission scolaire ou du ministre pour ouvrir une classe ° With fewer than 23 students discretionary power of school board or minister to open a class: Oui - Commission scolaire  
Yes - School board
- 11) Pouvoir discrétionnaire de la commission scolaire ou du ministre pour ouvrir une école ou la fermer ° Discretionary power of school board or minister to open a school or close it: Oui - Commission scolaire  
Yes - School board

DESCRIPTION GÉNÉRALE DU SYSTÈME  
GENERAL DESCRIPTION OF THE SYSTEM

**LOI, RÈGLEMENT, DIRECTIVE**

: Loi sur les écoles publiques, RSM, 1980.

**ACT, REGULATION, DIRECTIVE** C.P. 250, a. 79. Règlement 5/81.

**PROCESSUS**

Le français et l'anglais sont les langues d'enseignement. Une classe doit être ouverte si 23 élèves francophones par niveau le demandent par l'entremise de leurs parents. Lorsqu'une école offre le programme français, 75% de l'enseignement se fait en français. Si le nombre minimal ne peut être réuni, le ministre peut ordonner au conseil scolaire de prendre des mesures pour dispenser l'enseignement demandé.

On retrouve la plus grande diversité dans les cours et les programmes en français, allant du français pour une période par jour jusqu'au français complet, sauf l'anglais langue seconde. La liberté complète de choix de la langue fait en sorte que des francophones ne reçoivent qu'un enseignement partiel en français.

**RÉFORMES À VENIR**

Les francophones voudraient obtenir des écoles homogènes françaises, faire abaisser le nombre minimal, obtenir la garantie du droit de gestion des écoles.

**PROCESS**

French and English are the languages of instruction. A French class must be opened if parents of 23 students per level ask it. If a school offers the French program, 75% of instructional time is in French. If the minimal number cannot be assembled, the minister may order the school board to take measures to grant the required classes.

The greatest diversity exists in Manitoba. French is taught from 25% of instructional time to 100% of the time, save English as a second language. Freedom of choice has the result that many francophones receive only partial French instruction.

**REFORMS TO COME**

Francophone groups would like to secure the right to homogeneous schools, to lower the minimal number, to obtain the right to school boards.



Province: Saskatchewan

- 1) Population francophone ° French population: 2.6%
- 2) Concentration territoriale ° Territorial concentration:  
North Battleford et le nord-ouest ° and the northwest: Delmas, Vawn, Spiritwood, Laventure, St-Pierre, Leoville, Makwa, Meadowlake  
Prince Albert et district ° and district: Prince Albert, Domremy, Albertville, Victoire, Debden  
Le nord-est ° the northeast: Zenon Park, Arborfield, St-Brieux, St. Front, Perigord  
Saskatoon et district ° and district: Saskatoon, Vonda, St-Denis, Prud'homme  
Regina et district ° and district: Regina, Montmartre, Sedley, Radville  
Le sud-est ° The southeast: Bellegarde, Storthoaks, Wauchope, Redvers, Forget  
Gravelbourg, Assiniboine - le sud-ouest ° - the southwest: Gravelbourg, Coderre, Ponteix, Cadillac, Laflèche, Courval, Ferland, St-Victor, Willowbunch, Assiniboine, Lisieux, Val Marie, Dollard
- 3) Population scolaire francophone ° French school population: 0.5%
- 4) Écoles francophones homogènes ° French schools: 9 Type A,  
8 Type B  
Total 17
- 5) Conseils scolaires dispensant l'enseignement en français ° School boards offering French language of instruction: 22
- 6) Libre choix de la langue d'enseignement ° Freedom of choice of language of instruction: Oui  
Yes
- 7) Conseils scolaires francophones ° French school boards: Aucun  
None
- 8) Nombre minimal requis pour classe française ° Minimal number warranted for opening of a class: 15 pouvant se maintenir sur trois années consécutives  
15 over 3 consecutive years

9) Transport des francophones d'une division scolaire à une autre aux frais de la division de résidence et qui est remboursé par le ministère selon les barèmes des formules d'octroi °  
Transportation of francophones from one school division to another with the first division paying costs and which is reimbursed by the department according to its granting formula.

Si le programme n'est pas offert  
If program not offered

10) Pouvoir discrétionnaire de la commission scolaire ou du ministre pour ouvrir une classe ° Discretionary power of school board or minister to open a class:

Le pouvoir n'est pas discrétionnaire si les conditions préalables sont en place.  
No discretionary power if conditions to open a class are complied with.

11) Pouvoir discrétionnaire de la commission scolaire ou du ministre pour ouvrir une école ou la fermer ° Discretionary power of school board or minister to open a school or close it:

Le pouvoir n'est pas discrétionnaire si les conditions préalables sont en place.  
No discretionary power if conditions to open a class are complied with.

DESCRIPTION GÉNÉRALE DU SYSTÈME  
GENERAL DESCRIPTION OF THE SYSTEM

LOI, RÈGLEMENT, DIRECTIVE

: 1978 c. 17, s. 180.

ACT, REGULATION, DIRECTIVE Reg. 116/81, s. 32.1 - 32.9.

PROCESSUS

Programme Type A: français  
Type B: bilingue

Complexe. Il faut une demande d'un comité consultatif ou de parents de 15 élèves. Le Conseil scolaire doit la transmettre au ministre. Le ministre doit la transmettre au Cabinet avec recommandation d'approuver, si:

1. l'école comptera 15 élèves dans le niveau visé, ou n'offrira que le programme désigné;
2. le ministre est convaincu que le programme pourra fonctionner trois ans, et que les élèves ne désirant pas le suivre seront dirigés ailleurs.

Si aucun programme approprié n'est offert, l'élève doit être transporté vers un conseil scolaire qui l'offre au frais du conseil scolaire de résidence.

Le Cabinet doit approuver une recommandation du ministre.

Le libre choix est total.

RÉFORMES À VENIR

Les francophones voudraient transformer les écoles bilingues en écoles homogènes, contrôler le libre choix, rendre le processus plus simple, obtenir la gestion scolaire, abaisser le nombre.

PROCESS

Program Type A: French  
Type B: Bilingual

The process is complex. A request must come from either the school's advisory committee on French instruction, or from parents of at least 15 students in the same level. The school board must forward the request to the minister. The minister must forward it to the cabinet with a positive recommendation, if

1. the school will have 15 students in the designated level, or will offer only the designated program.
2. the minister is satisfied that the program may be offered for 3 consecutive years, and that students not wishing to follow it will receive proper care.

If no appropriate program is offered, the student must be bused to the nearest school offering one.

The cabinet must approve the request of the minister.

Freedom of choice of the language of instruction is complete.

REFORMS TO COME

Francophones would like to transform bilingual schools into french schools, control freedom of choice, simplify the process, obtain the right to a french school board, lower the minimal number.

**Province: Alberta**

- 1) Population francophone ° French population: 2.8%
- 2) Concentration territoriale ° Territorial concentration: Edmonton, Calgary, Lac La Biche, Vegreville, Peace River
- 3) Population scolaire francophone ° French school population: 2.8%
- 4) Écoles francophones homogènes ° French schools:  
7 homogènes, - 7 homogeneous  
7 hétérogènes, - 70 heterogeneous  
2 écoles homogènes T.77/1500-5.1%  
5 écoles avec programmes francophones, T. 7.
- 5) Conseils scolaires dispensant l'enseignement en français ° School boards offering French language of instruction: 36/130-22% (dont 2 bases militaires)
- 6) Libre choix de la langue d'enseignement ° Freedom of choice of language of instruction: Oui  
Yes
- 7) Conseils scolaires francophones ° French school boards: Non  
No
- 8) Nombre minimal requis pour classe française ° Minimal number warranted for opening of a class: Discrétionnaire  
Discretionary
- 9) Transport des francophones d'une division scolaire à une autre aux frais de la division de résidence ° Transportation of francophones from one school division to another with the first division paying costs: Discrétionnaire  
Discretionary
- 10) Pouvoir discrétionnaire de la commission scolaire ou du ministre pour ouvrir une classe ° Discretionary power of school board or minister to open a class: Oui - Commission scolaire  
Yes - School board
- 11) Pouvoir discrétionnaire de la Commission scolaire ou du ministre pour ouvrir une école ou la fermer ° Discretionary power of School Board or minister to open a a school or close it: Oui - Commission scolaire  
Yes - School board



DESCRIPTION GÉNÉRALE DU SYSTÈME  
GENERAL DESCRIPTION OF THE SYSTEM

LOI, RÈGLEMENT, DIRECTIVE

: School Act, Regulation 490/82.

ACT, REGULATION, DIRECTIVE

Directive sent to school boards by the minister of education,  
December 1984.

"Partners in Education"

Policy statement, 1978.

3 Programs: core, bilingual, immersion

PROCESSUS

Un conseil peut choisir l'un ou l'autre  
programme. Il peut autoriser l'enseignement  
dans une langue autre que l'anglais. Si le  
français est autorisé, le règlement établit  
le temps minimal d'anglais.

Il n'y a pas de droit à des classes, ni à  
des écoles ni à la gestion scolaire.

Le libre choix est complet.

RÉFORMES À VENIR

L'affaire Bugnet pose la question de la  
validité de ces dispositions.

PROCESS

A school board may choose one or the  
other program. It may authorize the  
teaching in a language other than  
English. If French is authorized, the  
regulation establishes the minimal  
English time.

There are no rights to classes, schools  
or school boards.

Freedom of choice is complete.

REFORMS TO COME

The Bugnet case asks the question of the  
validity of this system.

**Province:** Colombie-Britannique  
British Columbia

- |  |   |
|--|---|
| 1) Population francophone ° French population:   | 1.7%  |
| 2) Concentration territoriale ° Territorial concentration: Vancouver, Okanagan, Prince George, Kitimat   |   |
| 3) Population scolaire francophone ° French school population:   | 0.3%  |
| 4) Écoles francophones homogènes ° French schools:   | Une<br>One                                      |
| 5) Conseils scolaires dispensant l'enseignement en français ° School boards offering French language of instruction:   | 24/75 : 32%                                     |
| 6) Libre choix de la langue d'enseignement ° Freedom of choice of language of instruction:   | Oui<br>Yes                                      |
| 7) Conseils scolaires francophones ° French school boards:   | Non<br>No                                       |
| 8) Nombre minimal requis pour classe française ° Minimal number warranted for opening of a class:  | 10 - élémentaire<br>15 - secondaire             |
| 9) Transport des francophones d'une division scolaire à une autre aux frais de la division de résidence ° Transportation of francophones from one school division to another with the first division paying costs: | Si nombre non atteint<br>If number not reached  |
| 10) Pouvoir discrétionnaire de la commission scolaire ou du ministre pour ouvrir une classe ° Discretionary power of school board or minister to open a class:   | Non si nombre atteint<br>None if number reached |
| 11) Pouvoir discrétionnaire de la commission scolaire ou du ministre pour ouvrir une école ou la fermer ° Discretionary power of school board or minister to open a school or close it:                            | Oui - Commission scolaire<br>Yes - School board |

DESCRIPTION GÉNÉRALE DU SYSTÈME  
GENERAL DESCRIPTION OF THE SYSTEM

LOI, RÈGLEMENT, DIRECTIVE

: Circular 146.

ACT, REGULATION, DIRECTIVE

PROCESSUS

Si les parents de 10 enfants le demandent, une classe doit être ouverte. Le programme-cadre de français s'adresse aux francophones, k-7.

Il n'y a pas de droit à des écoles ni à la gestion.

L'accès au PCDF est défini par l'article 23.

RÉFORMES À VENIR

Développer le programme et l'étendre.  
Corriger les problèmes de transport.

PROCESS

If parents of 10 children require it, a class must be opened. The French language core curriculum is oriented towards Francophones, at level K-7.

There is no right to schools or school boards.

Access to PCDF is defined by 23.

REFORMS TO COME

Develop the program and extend it.  
Correct transportation problems.

**Province: Territoires du Nord-Ouest  
Northwest Territories**

- |  |  |
|--|--|
| 1) Population francophone ° French population:   | 2.7%   |
| 2) Concentration territoriale ° Territorial concentration: Yellowknife, Frobisher Bay, Nanisivik, Inuvik, Hay River, Fort Smith, Pine Point  |  |
| 3) Population scolaire francophone ° French school population:   | 4,200  |
| 4) Écoles francophones homogènes ° French schools:   | Aucune<br>None   |
| 5) Conseils scolaires dispensant l'enseignement en français ° School boards offering French language of instruction:   | 2 Yellowknife<br>Immersion K-2<br>(Catholic)<br>4-9 (Public) |
| 6) Libre choix de la langue d'enseignement ° Freedom of choice of language of instruction:   | N/A  |
| 7) Conseils scolaires francophones ° French school boards:   | Aucun<br>None  |
| 8) Nombre minimal requis pour classe française ° Minimal number warranted for opening of a class:  | Discrétionnaire<br>Discretionary                             |
| 9) Transport des francophones d'une division scolaire à une autre aux frais de la division de résidence ° Transportation of francophones from one school division to another with the first division paying costs: | Non<br>No  |
| 10) Pouvoir discrétionnaire de la commission scolaire ou du ministre pour ouvrir une classe ° Discretionary power of school board or minister to open a class:   | Oui<br>Yes   |
| 11) Pouvoir discrétionnaire de la commission scolaire ou du ministre pour ouvrir une école ou la fermer ° Discretionary power of school board or minister to open a school or close it:                            | Oui<br>Yes   |



**DESCRIPTION GÉNÉRALE DU SYSTÈME**  
**GENERAL DESCRIPTION OF THE SYSTEM**

<b>LOI, RÈGLEMENT, DIRECTIVE</b>	Ordonnance scolaire, 1977, c. 2, am. ord. 3-83 (2), a. 54 + 55.
<b>ACT, REGULATION, DIRECTIVE</b>	School ordinance, 1977, c. 2, am. ord. 3-83 (2), a. 54 + 55.

**PROCESSUS**

Il n'y a ni loi, ni règlement ni directive portant sur l'instruction en français. Les dispositions de l'ordonnance laissent aux autorités locales le choix de la langue aux niveaux K-2; si ce n'est pas l'anglais, l'anglais doit être enseigné comme langue seconde et des anglophones ont droit à l'instruction en anglais. Si c'est l'anglais qui est prescrit mais n'est pas la langue de la majorité, leur langue est utilisée comme langue seconde.

Aux niveaux 3-12, le ministre prescrit la langue. Si celle-ci est différente de celle de la majorité des élèves, l'autorité locale peut prescrire une langue différente.

**RÉFORMES À VENIR**

Développer un programme en français.

**PROCESS**

There is no legal text dealing specifically with French instruction. The school ordinance leaves it to local authorities to prescribe the language of instruction in K-2. If it is not English, English must be taught as a second language and anglophones have a right to be taught in English. If it is English but it is not the language of the majority, that language may be taught as a second language.

In grades 3-12, the minister prescribes the language. If it is different to that of the majority, the local authorities may prescribe a different language.

**REFORMS TO COME**

Develop a French program.

**Province:** Yukon

- |  |                                  |
|--|----------------------------------|
| 1) Population francophone ° French population:   | 2.5%                             |
| 2) Concentration territoriale ° Territorial concentration: Whitehorse  |                                  |
| 3) Population scolaire francophone ° French school population:   | ± 40                             |
| 4) Écoles francophones homogènes ° French schools:   | 1 mixte<br>1 mixed               |
| 5) Conseils scolaires dispensant l'enseignement en français ° School boards offering French language of instruction:   | 1                                |
| 6) Libre choix de la langue d'enseignement ° Freedom of choice of language of instruction:   | N/A                              |
| 7) Conseils scolaires francophones ° French school boards:   | Aucun<br>None                    |
| 8) Nombre minimal requis pour classe française ° Minimal number warranted for opening of a class:  | Discrétionnaire<br>Discretionary |
| 9) Transport des francophones d'une division scolaire à une autre aux frais de la division de résidence ° Transportation of francophones from one school division to another with the first division paying costs: | N/A                              |
| 10) Pouvoir discrétionnaire de la commission scolaire ou du ministre pour ouvrir une classe ° Discretionary power of school board or minister to open a class:   | Oui<br>Yes                       |
| 11) Pouvoir discrétionnaire de la commission scolaire ou du ministre pour ouvrir une école ou la fermer ° Discretionary power of school board or minister to open a school or close it:                            | Oui<br>Yes                       |

DESCRIPTION GÉNÉRALE DU SYSTÈME  
GENERAL DESCRIPTION OF THE SYSTEM

LOI, RÈGLEMENT, DIRECTIVE - Directive, octobre 1984.

:  
ACT, REGULATION, DIRECTIVE R.O. Yukon, C-5-3, s. 115.

PROCESSUS  
PROCESS

La loi impose l'anglais mais laisse au  
surintendant la discrétion de choisir une  
autre langue.

Un programme-cadre a été mis sur pied et  
commence à s'implanter.

The School Act imposes English but  
leaves the superintendent free to order  
another language.

A core curriculum has been set up and is  
being implemented.

RÉFORMES À VENIR

Développer le programme français.

REFORMS TO COME

Develop the French program.

**APPENDIX II: Draft Education Act:  
Provisions Respecting Rights of Linguistic Minorities**

1. In this Act,
  - (a) "minority" means the official language minority in a province;
  - (b) "member of the minority" means a person who fulfils the conditions set out in section 23 of the Canadian Charter of Rights and Freedoms;
  - (c) "minority-language educational facility" means a distinct and separate physical structure, administered by members of the minority, which provides instruction in the language of the minority exclusively, which promotes and strengthens the culture and values of the official language-minority community and which has access to the necessary facilities and personnel for accomplishing these objectives;
  - (d) "minority-language management unit" means a distinct administrative unit that is exclusively responsible for managing the minority-language educational facilities under its jurisdiction;
  - (e) "school board" means a school board of the official language-majority in the province;
  - (f) "minister" means the minister of education in the province;
  - (g) "residence" means the ordinary place of residence during more than one-half of the school year;
  - (h) "attendance area" means the territory served by a school.
2. Subject to the admission criteria that may be established by regulation, any child, one of whose parents fulfils one of the requirements set out in subsections 23(1) and (2) of the Canadian Charter of Rights and Freedoms, is entitled to receive elementary and secondary education in the minority-language wherever in the province such child may reside.
3.
  - (1) The right recognized in section 2 shall be exercised in the minority-language educational facility located closest to the pupil's place of residence.
  - (2) If there is no minority language educational facility located within a reasonable distance from the pupil's place of residence, the minority-language management unit or the minister shall enter into an agreement with the parents
    - (a) to transport the pupil to the closest minority-language educational facility each morning and evening, or;



- (b) to transport the pupil to the minority-language educational facility four times per year and to offer the pupil lodging, if necessary, or;
  - (c) to open a class for minority-language instruction in the pupil's territory for a very low number of minority pupils.
- (3) The agreement referred to in subsection (2) shall comply with criteria that may be established by regulation.
4. (1) Where there is a minority-language management unit, such unit shall determine, in accordance with criteria that shall be established by regulation, the site of the minority-language educational facility, its attendance area and the grades that will be offered.
- (2) Where there is no minority-language management unit, the minister shall determine, in accordance with criteria that may be established by regulation, the site of the minority-language educational facility, its attendance area, the grades that will be offered and the minority-language management unit under whose jurisdiction it shall be.
5. Minority-language educational facilities shall be administered exclusively by the members of the minority, in accordance with the principles established in this Act.
6. (1) When the minister receives a request for the establishment of a minority-language management unit from a group of parents who qualify under section 23 of the Canadian Charter of Rights and Freedoms, he shall establish such a unit by order, and shall designate the territory under the jurisdiction of the unit and the number of members of the unit.
- (2) When the minister establishes the territory of a minority-language management unit and the number of its members, he shall do so in accordance with the criteria established by regulation.
- (3) The minister shall appoint the first members of the minority-language management unit, who shall hold office until the next school election in the province.
- (4) If the applicants are already under the jurisdiction of a minority-language management unit, and the criteria established by regulation have not been fulfilled, the minister shall not establish a management unit.
- (5) The decision of the minister may be appealed to the court of superior jurisdiction in the province.

7. (1) Any person

(a) who is qualified to be a member of a school board in accordance with the provisions of this Act,

(b) who is qualified by virtue of section 23 of the Canadian Charter of Rights and Freedoms, and

(c) who has a practical knowledge of the minority-language and culture

shall be qualified to be a member of the minority-language management unit.

(2) Any person

(a) who is qualified by virtue of section 23 of the Canadian Charter of Rights and Freedoms,

(b) who has a practical knowledge of the minority-language and culture, and

(c) who has a child in attendance at a minority-language educational facility

shall be qualified to elect a member of a minority-language management unit.

(3) Members of the minority-language management unit shall be elected in accordance with the procedures for electing the members of a school board in the province.

8. (1) The minority-language management unit shall have exclusive jurisdiction over minority-language educational facilities, identical to the powers conferred by this Act on a school board over majority-language educational facilities; in particular, but not so as to restrict the generality of the foregoing, the minority-language management unit shall:

(a) select the site of minority-language educational facilities under its jurisdiction and determine their attendance area and the grades that they will offer, subject to the criteria established by regulation;

(b) determine the type of educational facilities, including their denominational affiliation;

(c) establish rules for closing schools under its jurisdiction and procedures for transferring pupils;

(d) hire teachers, subject to the criteria established by regulation, and direct their assignment in the territory under its jurisdiction;

(e) provide the enrolment and admission of pupils;

(f) establish the educational project of the minority-language school;

(g) implement programs in the minority-language educational facilities;

- (h) establish, implement and evaluate supplementary programs in minority-language educational facilities;
  - (i) hire and assign non-teaching professional personnel;
  - (j) administer, maintain, repair and make available the necessary buildings and equipment for provision of instruction in the minority-language;
  - (k) manage the budget;
  - (l) collect school taxes in accordance with the provisions of this Act;
  - (m) organize school transport in accordance with the regulations;
  - (n) hire, establish the duties of and dismiss administrative personnel;
  - (o) purchase, rent or otherwise obtain the use of the necessary premises and equipment for performing its duties;
  - (p) establish rules for its internal operations.
9. In the performance of its duties, the minority-language management unit shall respect denominational school rights; in particular, and not so as to restrict the generality of the foregoing:
- (1) members of the minority who are members of a class of persons protected by section 93 of the Constitution Act, 1867 shall have the exclusive right to elect trustees, in the same proportion as pupils in attendance at denominational schools to pupils in attendance at non-denominational schools under the jurisdiction of the minority-language management unit;
  - (2) the trustees shall have the exclusive right to manage denominational schools, and with respect to such schools shall have the following powers:
    - (a) selection of teachers, assignment of teachers to denominational schools, certification of teachers and establishment of conditions of employment respecting denominational affiliation, in addition to the conditions prescribed by regulation,
    - (b) admission of pupils to denominational schools and establishment of conditions of admission respecting denominational affiliation, in addition to the conditions prescribed by regulation, and
    - (c) establishment of the denominational educational project and of programs relating to the denominational nature of the schools;
  - (3) other matters within the jurisdiction of the minority-language management unit shall be managed jointly by the trustees and the other members of the minority-language management unit;
  - (4) Any person
    - (a) who is qualified by virtue of subsection 1(1) of this Act, and
    - (b) who is identified as a denominational school supporter when he or she is nominated

is qualified to be a minority trustee;

(5) Any person

- (a) who is qualified by virtue of subsection 7(2) of this Act, and
- (b) who is identified as a denominational school supporter when the voters' list is prepared

is qualified to vote in an election of minority trustees;

(6) Minority trustees shall be elected at the same time and in the same manner as other members of the minority-language management unit.

10. Financing for minority-language educational facilities shall be provided in accordance with the normal procedures established in this Act, in the regulations and in the budget rules, subject to the following conditions:

- (a) minority-language educational facilities shall receive a share of public funds in proportion to their needs, and
- (b) minority-language educational facilities shall not be penalized because they have lower registration than the provincial average.

11. The Lieutenant-Governor-in-Council shall make regulations:

- (a) establishing the criteria for the opening of a minority-language educational facility, and the grades to be offered;
- (b) establishing the criteria for determining the attendance area of a minority-language educational facility;
- (c) establishing criteria for the selection of a site for a minority-language educational facility;
- (d) establishing criteria for the transport of pupils to minority-language educational facilities;
- (e) establishing criteria for the admission of pupils to minority-language educational facilities;
- (f) establishing criteria for establishing a minority-language management unit, the territory under its jurisdiction and the number of members of the unit;
- (g) establishing criteria for hiring teaching personnel;
- (h) establishing an arbitration board and the powers, composition, mandate and procedures for such board.





## APPENDIX III: Draft Regulations

### 1. Educational Facilities

- 1.1 In deciding whether to create a minority-language educational facility, the minister or minority-language management unit shall consider the following:
  - (a) the concentration of the minority population;
  - (b) whether the requested facility is in an urban or rural area;
  - (c) the demand for services;
  - (d) the availability of school transport, the condition of the roads, the distances to be travelled and the ages of the children to be transported;
  - (e) the number of classes that can be operated;
  - (f) the distance of the nearest minority-language educational facility;
  - (g) the availability of professional resources and of learning materials;
  - (h) the average size of majority-language classes of the same type;
  - (i) the size of the smallest majority-language school and the circumstances in which it has been authorized to remain open;
  - (j) the average size of minority-language educational facilities in comparable demographic and geographic situations elsewhere in the province or in other provinces.
- 1.2 The site selected for the establishment of a minority-language educational facility shall be the closest available site to the centre of concentration of the minority population in a region.
- 1.3 In deciding the attendance area of a minority-language educational facility and the grades to be offered, the minister or the minority-language management unit shall consider the following:
  - (a) the concentration of the minority population;
  - (b) whether the requested facility is in an urban or rural area;
  - (c) the age of children who qualify under section 23 of the Canadian Charter of Rights and Freedoms;
  - (d) the availability of school transport, the condition of the roads, the distance to be travelled and the ages of the children to be transported;
  - (e) the possibility of grouping two grades within a single class;
  - (f) the average size of majority-language classes;
  - (g) the size of the smallest majority-language class and the circumstances in which it has been authorized to remain open;
  - (h) the average size of minority-language classes in comparable demographic and geographic situations elsewhere in the province or in other provinces.

- 1.4 The minority-language management unit shall provide transport for any student whose place of residence is located in a territory under its jurisdiction and who resides more than two kilometres from the minority-language educational facility closest to his or her place of residence.
- 1.5 If the minority-language educational facility closest to the student's place of residence is located in a territory under the jurisdiction of another minority-language management unit, the two management units shall enter into an agreement to permit the student to attend the minority-language facility closest to his or her place of residence, and such agreement shall:
  - (a) specify the financial responsibilities of each management unit for the student's instruction;
  - (b) specify the educational responsibilities of each management unit for the student's instruction;
  - (c) specify the responsibilities of each management unit for the student's transport.

## 2. Admission and Hiring Criteria

- 2.1 (a) In order to be admitted to a minority-language educational facility, a child of a member of the minority shall:
    - (i) reside in the territory of the attendance area of the facility, or be subject to section 1.4 of this Regulation;
    - (ii) be of school age;
    - (iii) have sufficient language ability to take courses in the minority language.
  - (b) If a teacher has doubts about a child's ability to fulfil the requirements of subparagraph (a)(iii) when that child is first enrolled in an educational facility, he or she shall so advise the minority-language management unit.
  - (c) In a case that arises under paragraph (b), the management unit shall have the student take a language aptitude test recognized by the minister.
  - (d) If the child is unable to pass the test referred to in paragraph(c), the management unit shall provide the child with special catch-up language training.
- 2.2 (a) In order to be admitted to a minority-language educational facility, the child of a person who is not a member of the minority shall be approved for enrolment by an admissions committee made up of the principal of the minority-language educational facility, a teacher and a parent of a student who is enrolled in the facility.

(b) The admissions committee shall consider the following:

- (i) the ability of the student to function in the minority-language;
- (ii) the desire of the student or the student's parent to respect the cultural or social character of the minority-language educational facility;
- (iii) the proportion of students in the class involved whose parents are not members of the minority.

2.3 In order to teach in a minority-language educational facility, a teacher shall:

- (a) be qualified to teach in the province, according to the usual requirements of the Act and Regulations;
- (b) have a thorough knowledge of the language of instruction;
- (c) be committed to the educational, social and cultural project of the minority-language educational facility.

### 3. Management Unit

3.1 In determining the territory under the jurisdiction of a minority-language management unit, the following factors shall be taken into consideration:

- (a) the concentration of the minority population;
- (b) the distance to another management unit;
- (c) the average size of school boards in the province;
- (d) the number of educational facilities that will be under the jurisdiction of the management unit;
- (e) the size of minority-language school boards in other provinces;
- (f) the proportion that the minority population is of the whole population of the region;
- (g) the nature of the request presented by members of the minority;
- (h) whether the proposed management unit will be in an urban or rural area.

3.2 The minority-language management unit shall be made up of a minimum of three members and a maximum number of members which shall be in proportion to the student population that it serves, in accordance with the usual rules in effect in the province.

3.3 For the purposes of elections of members of the minority-language management unit, the territory under the jurisdiction of the unit may be divided into electoral districts in order to ensure proportional representation of each educational facility administered by the unit.

3.4 In management units where there are already denominational schools, any division of seats and electoral districts shall be in accordance with the Act.



- 3.5 In allocating its budget, the minority-language management unit shall ensure that the needs of each educational facility under its jurisdiction are met.
- 3.6 In implementing the programs of the department and in establishing new programs, the minority-language management unit shall ensure that the values and culture of the minority are promoted and respected.
- 3.7 (a) When a new management unit is created, any disputes concerning transfers of property, assets and liabilities between the school board and the management unit shall be submitted to an arbitration committee.
- (b) The committee shall be composed of three members to be appointed by the minister, of whom two shall be selected by taking one from a list submitted by the management unit and one from a list submitted by the school board.
- (c) The committee shall hear the parties, and may receive written and oral evidence, and shall conduct all inquiries that it may consider appropriate.
- (d) The committee shall submit a report to the minister within 60 days of the commencement of the arbitration, and the report shall be available to the public.
- (e) The minister shall provide a decision supported by reasons within seven days of receipt of the report of the committee and shall not exceed the time limit in this paragraph.
- (f) The minister shall not be bound by the report, but shall provide reasons if he rejects the whole or any part of it.
- (g) The decision of the minister shall be final and is not subject to appeal.
- 3.8 (a) When a new management unit is created, any disputes concerning transfers of personnel between the school board and the management unit, certification of union bargaining units or the extension of collective agreements between the new employees and the management unit shall be submitted to an arbitration board.
- (b) The board shall be composed of three members to be appointed by the minister, of whom two shall be selected by taking one from a list submitted by each of the parties.
- (c) The board shall hear the parties and decide the matter in accordance with the law then in effect.
- (d) The decision of the arbitration board shall be final and is not subject to appeal.

#### APPENDIX IV: Table of Legislation

##### Newfoundland

1. Newfoundland Teacher (Collective Bargaining) Act, SNfld., 1973, c. 114, amended SNfld., 1975, c. 44, art. 2.
2. School Act, SNfld., 1927, c. 14.
3. School Act, SNfld., 1960, c. 50.
4. School Act, RSNfld., 1970, c. 346, amended SNfld., 1983, c. 76.
5. Newfoundland Act, 1949.

##### Prince Edward Island

1. Schools Act (1825), 5 Geo IV, c. 5.
2. Act to consolidate and amend the several laws relating to education (1861), 24 Vict., c. 36.
3. Education Act (1868), 31 Vict., c. 6.
4. Public Schools Act (1877), 40 Vict., c. 1.
5. Department of Education Act (1945), 9 Geo. VI, c. 11.
6. School Act (1971), 20 El. II, c. 55.
7. School Act, RSPEI, 1974, c. S-2.
8. Act to amend the School Act (1980), 29 El. II, c. 48.
9. EC 674/76.
10. EC 889/80 - EC 653/80.

##### Nova Scotia

1. Act concerning Schools (1766), 6 Geo. III, c. 6.
2. Act concerning Schools (1786), 26 Geo. III, c. 1.

3. Grammar School Act (1811), 41 Geo. III, c. 9.
4. Act to amend the Grammar School Act (1826), 7 Geo. IV, c. 5.
5. Grammar School Act (1831), 2 William IV, c. 2.
6. An Act concerning Schools (1841), 4 Vict., c. 43.
7. Public Instructions Act, RSNS, 1864, c. 58.
8. Education Act, NSS, 1918, c. 19.
9. Education Act, RSNS, 1923, c. 29; RSNS, 1867, c. 81.
10. Education Act, RSNS, 1974, c. E-2.
11. Act to amend the Education Act, NSS, 1981, c. 20.

#### New Brunswick

1. Grammar Schools Act (1816), 56 Geo. III, c. 21.
2. Act for encouraging the Creation of Schools (1816), 56 Geo. III, c. 23.
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4. Common Schools Act (1871), 34 Vict., c. 21.
5. Official Languages Act, RSNB, 1973, c. 0-1.
6. School Act, RSNB, 1973, c. S-5, Reg. 81-156.

#### Quebec

1. Education Act (1903), 3 Ed. VII, c. 16.
2. Education Act, RSQ, 1977, c. I-14.
3. Act respecting Municipal Taxation, SQ, 1979, c. 72.
4. Act respecting Grants to School Boards, RSQ, 1977, c. S-36.
5. Charter of the French Language, RSQ, 1977, c. C-11.
6. Act respecting Public Elementary and Secondary Education, Bill 3, 1985.
7. Act respecting the Ministère de l'éducation, RSQ, 1977, c. M-15.

8. Act respecting the Conseil Supérieur de l'éducation, RSQ, 1977, c. C-60.

#### Ontario

1. Act concerning Schools (1809), 47 Geo. III, c. 6.
2. Separate Schools Act (1863), 26 Vict., c. 5.
3. Common Schools Act (1859), 22 Vict., c. 64.
4. Common Schools Act (1849), UC, c. 83; (1915), 5 Geo. V, c. 45.
5. Education Act, RSO, 1980, c. 129; Reg. 617-81.

#### Manitoba

1. Manitoba Act (1870), 33 Vict., c. 3.
2. School Act (1871), 34 Vict., c. 12.
3. School Act (1881), 45 Vict., c. 8, c. 11.
4. Public Schools Act (1890), 53 Vict., c. 38.
5. Public Schools Act, SM, 1897, c. 26.
6. Public Schools Act, SM, 1916, c. 88.
7. Public Schools Act, SM, 1952, c. 50.
8. Public Schools Act, SM, 1967, c. 59.
9. Public Schools Act, SM, 1970, c. 113.
10. Public Schools Act, RSM, 1980, c. P-250; Reg. 170-77.
11. Education Administration Act, RSM, 1980, c. E-10.

#### Saskatchewan

1. Northwest Territories Act, RSC, 1970, c. N-22.
2. Saskatchewan Act (1905), 4-5 Ed. VII, c. 42.
3. School Act, RSS, 1909, c. 100.
4. Education Act, RSS, 1978, c. E-0.1.
5. Teacher Collective Bargaining Act, SS, 1973, c. 112.



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#### Alberta

1. Alberta Act (1905), 4-5 Ed. VII, c. 3.
2. School Act, RSA, 1980, c. S-3.
3. School Act, SA, 1952, c. 80.
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2. Act to amend the Schools Act (1982), 30-31 El. II, c. 27.

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Bareham v. Bd. of Ed. for City of London (1984), 3 OAC, p.335.

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## APPENDIX VII: Relevant Constitution Documents

### 1. Constitution Act, 1867:

**s. 93.** In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions: —

- (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:
- (2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:
- (3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor-General-in-Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:
- (4) In case any such Provincial Law as from Time to Time seems to the Governor-General-in-Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor-General-in-Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor-General-in-Council under this Section.

### 2. Manitoba Act, 1870:

**s. 22.** In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions: —

- (1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have a by Law or practice in the Province at the Union: —
- (2) An appeal shall lie to the Governor-General-in-Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education:



- (3) In case any such Provincial Law, as from time to time seems to the Governor-General-in-Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor-General-in-Council on any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor-General-in-Council under this section.

3. Alberta Act:

**s. 17.** Section 93 of The British North America Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph: —

- (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-west Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances."
- (2) In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.
- (3) Where the expression "by law" is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression "at the Union" is employed, in the said paragraph 3, it shall be held to mean the date at which this Act comes into force.

4. Newfoundland Act:

**s. 17.** In lieu of section ninety-three of the British North America Act, 1867, the following Term shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of Union, and out of public funds of the Province of Newfoundland, provided for education,

- (a) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature for all schools then being conducted under authority of the Legislature; and
- (b) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis.

5. Canadian Charter of Rights and Freedoms:

Guarantee of Rights and Freedoms

**s.1.** The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Equality Rights

**s. 15. —**

- (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

**s. 16 —**

- (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.
- (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.
- (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

Minority Language Educational Rights

**s.23** —

(1) Citizens of Canada

- (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
- (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

- (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.
- (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province.
  - (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority-language instruction; and
  - (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority-language educational facilities provided out of public funds.

**s. 27.** This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

**s. 29.** Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.











